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1929.

THE

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KING'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

C. A.

LAWRENCE *v.* GEORGE MATTHEWS (1924), LIMITED.

1928

July 10, 30.

Workmen's Compensation—Fatal Accident—Commercial Traveller—Using Motor Bicycle on Rounds—Acquiescence by Employers—Injury by falling Tree—Claim by Dependant—Injury arising out of Employment—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 1, *sub-s.* 1.

The deceased workman was employed as a commercial traveller by the appellants, who were coal merchants, under an agreement under which he was to devote the whole of his time to the business of the appellants, and was to be paid a commission on all orders obtained by him for them, and was to pay his own travelling expenses. The appellants did not prescribe his journeys or the means by which he was to make them, but to their knowledge he travelled by a motor cycle and side car. Whilst so travelling on his way home he was struck on the road by a falling tree which was blown down by a severe gale which then prevailed in the district and was fatally injured. In arbitration proceedings by his widow, as dependant, for compensation for his death, the county court judge held that the accident arose out of the employment and made an award in her favour. On appeal by the appellants :—

Held (by Sankey and Russell L.JJ. ; Lord Hanworth M.R. dissenting), that the accident arose out of the employment on the ground that the deceased's employment brought him to a spot which, owing to the

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existence of the tree, had a quality that resulted in danger. The fact that the fall of the tree was caused by forces of nature was immaterial, as regard could only be had to the immediate cause of the accident—namely, the falling of the tree.

Thom or Simpson v. *Sinclair* [1917] A. C. 127 applied.

Held, by Lord Hanworth M.R., that the accident did not arise out of the employment on the ground that the deceased was not at the particular spot where the accident happened by the appellants' orders, and that the accident was not due to a general road risk, as the accident could only occur if the forces of nature were exercised upon the tree, a mishap to which all persons in the locality were subject.

APPEAL from an award of the judge of the Wolverhampton County Court sitting as arbitrator under the Workmen's Compensation Act, 1925.

Victor Allen Lawrence was a commercial traveller, and by an agreement made between him and George Matthews (1924). Ld., on February 11, 1927, he agreed to devote the whole of his time to the service of, and to use his best endeavours to obtain orders for, and promote the interests of, the company within the counties of Shropshire, Staffordshire, Cheshire, Worcester and Hereford. Lawrence was paid by a commission on orders introduced to the company and accepted by them, and he had to defray his own travelling expenses. Although the company did not prescribe his journeys, to the knowledge of the company he travelled on a motor cycle with a side car. He was engaged upon his duties as such traveller on October 28, 1927, and while returning, apparently homewards, from a journey on which he had secured at least one order for the company, he was struck on the road by a falling tree, blown down by a severe gale which swept the district on that evening, and was so seriously injured that he died on November 2, 1927, as the result of the accident.

In arbitration proceedings brought by the widow of the deceased, as dependant, for compensation for his death, the county court judge held that the deceased was a workman within the meaning of the Act, and that the accident arose out of and in the course of the employment. He accordingly made an award in her favour for 300*l*.

The employers appealed. The appeal was heard on July 10, 1928.

Cave K.C. and *R. H. Norris* for the appellants. The county court judge was wrong in holding that the accident arose out of the employment.

The authorities, it is submitted, support the following propositions :—

1. Where a man is employed to go about the streets on his employer's business and meets with an accident the accident is one which arises out of the employment.

2. Where a man is similarly employed and meets with an accident due to the forces of nature the accident is not one which arises out of the employment.

3. Where a man meets with an accident due to the forces of nature, and by the nature of his work is specially exposed to such accidents, the accident is one which arises out of his employment.

An example of a case falling within the last proposition is *Andrew* v. *Failsworth Industrial Society* (1), where a workman was struck by lightning whilst laying bricks at a height of 20 feet from the ground. That case was distinguished in *Kelly* v. *Kerry County Council* (2), where a roadman was killed while working on a road by being struck by lightning, and it was held that the accident did not arise out of the employment. Here there was no evidence before the county court judge that the deceased workman ran any greater risk of being struck by a falling tree than any other person using the road : see *Knyvett* v. *Wilkinson Bros., Ld.* (3) ; *Allcock* v. *Rogers.* (4) To entitle a workman or his dependants to succeed special exposure to risk must be proved. *Dennis* v. *A. J. White & Co.* (5) is an authority for the three propositions above stated. Where the risk incurred by the workman is the same as that incurred by any other member of the public the accident does not arise out of the employment : *Warner* v. *Couchman* (6) ; *George Anderson & Co.* (1905) v. *Adamson* (7) ; *Kinghorn* v. *Guthrie.* (8) Here at the time of the accident

(1) [1904] 2 K. B. 32. [1918] W. N. 96.
(2) (1908) 1 B. W. C. C. 194. (5) [1917] A. C. 479.
(3) (1918) 11 B. W. C. C. 50. (6) [1912] A. C. 35.
(4) (1918) 11 B. W. C. C. 149 ; (7) (1913) 6 B. W. C. C. 874.
(8) (1913) 6 B. W. C. C. 887.

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the deceased workman was not in a place in which he necessarily had to be by the terms of his employment. He was therefore not in the course of his employment at the time. The county court judge never considered the question of control. The evidence here is that the employers exercised no control whatever over the deceased workman. They did not prescribe his journeys. The deceased had a perfectly free hand in the matter. Control is vital as a test of whether or not a man is workman.

[They also referred to *Dickinson* v. "*Barmak*," *Ld.* (1); *St. Helen's Colliery Co.* v. *Hewitson* (2); *Lye* v. *British and Argentine Meat Co.* (1923), *Ld.* (3)]

Edgar Dale and *H. A. Tucker* for the respondent.

[LORD HANWORTH M.R. We need not trouble you on the question whether the deceased was a workman.]

Then as to whether the accident arose "in the course of" the employment. The county court judge has found that at the time of the accident the deceased was continuing in his employment, and, it is submitted, he was right in so finding: *Evans* v. *Postmaster-General.* (4)

As to whether the accident arose "out of" the employment, *Dennis* v. *A. J. White & Co.* (5) shows that it is sufficient to ascertain the proximate cause of the accident and that it is not necessary to go further and ascertain the remote cause. *Kinghorn* v. *Guthrie* (6) was overruled by the House of Lords in *Thom or Simpson* v. *Sinclair.* (7) The latter case, which practically affects all the earlier cases, decides that where the condition of the employment requires that the workman shall be in the particular spot where the accident happens the accident arises out of the employment. It is a question of fact when the employment begins and ends: *Evans* v. *Postmaster-General.* (4) Here the county court judge has found that the deceased workman was in the employment at the time of the accident. In *Allcock* v. *Rogers* (8) there was no condition that the

(1) (1908) 124 L. T. Newsp. 403.
(2) [1924] A. C. 59.
(3) (1927) 20 B. W. C. C. 341.
(4) (1924) 17 B. W. C. C. 151.
(5) [1917] A. C. 479.
(6) (1913) 6 B. W. C. C. 887.
(7) [1917] A. C. 127.
(8) (1918) 11 B. W. C. C. 149; [1918] W. N. 96.

workman should be in the place where the accident happened. In *Thom or Simpson* v. *Sinclair* (1) there was such a condition. The existence or non-existence of the condition distinguishes the two cases. *Upton* v. *Great Central Ry. Co.* (2) does not afford much assistance.

The authorities show that a commercial traveller is regarded as acting in the course of his employment during the whole period of time between starting from and returning to his home: *Dickinson* v. "*Barmak*," *Ld.* (3) The Court must decide the question of the duration of the employment upon the facts of each particular case. Here the road on which the deceased man was riding at the time of the accident was the proper road to his home. Cannock was in one of the counties in which he was employed to travel. His duty was to travel within five counties, and on the day of the accident he had travelled in two of them. He was therefore doing what he was bound to do by his agreement. All that the applicant had to do was to prove that the deceased man was travelling in the area in which he was employed to travel.

[They also referred to *Pierce* v. *Provident Clothing and Supply Co.* (4); *M'Neice* v. *Singer Sewing Machine Co.* (5)]

Cave K.C. in reply.

[LORD HANWORTH M.R. What do you say as to *Thom or Simpson* v. *Sinclair* (1)?]

That is an instance of a fourth class of cases—namely, cases of locality risk.

If the decision of the county court judge in this case stands its effect will be to make an employer the insurer of his workman against all accidents from the time he leaves his home to the time he returns to it in the evening.

Cur. adv. vult.

July 30. The following written judgments were delivered :—

LORD HANWORTH M.R. This is an appeal from an award dated May 25, 1928, made by the county court judge sitting at Wolverhampton, whereby he decided in favour of the

(1) [1917] A. C. 127.
(2) [1924] A. C. 302.
(3) (1908) 124 L. T. Newsp. 403.
(4) [1911] 1 K. B. 997.
(5) (1910) 4 B. W. C. C. 351.

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applicant, the widow of Victor Allen Lawrence, claiming as a dependant upon her husband, who died on November 2, 1927, as the result of an accident. [His Lordship stated the facts as above set out and continued :] Several points were taken by the appellants at the arbitration. The judge decided in the widow's favour that the deceased was a workman within the Act, that she was a dependant, and that the accident arose in the course of his employment. The appeal is taken on the one remaining point, which was argued before this Court—namely, that the accident did not arise out of his employment.

The evidence proved that the appellants did not interfere with or direct the deceased's journeys; he went on his business in his own way and at his own times. The county court judge held that the deceased died from an accident which, if not ordinary in the sense that it occurs every day, yet is not infrequent and is the kind of accident that any one who travels on the road is exposed to. The appellants claim that the accident was due to the forces of nature and not to any duty or obligation or cause incidental to the employment, and that there was no evidence upon which the judge could hold that it arose out of the employment.

There are a number of cases in which it appears to have been decided that employers are not liable to their workmen for accidents due to extraneous forces, unless the employment exposed the workman specially to the risk or placed him under a disability by depriving him of the means of protection from, or avoidance of, the dangers. Thus in *Kelly* v. *Kerry County Council* (1), the case of a workman whose duty it was to clear out gullies, and who, while so engaged, was struck by lightning, it was held that his death was not occasioned by an accident arising out of his employment; but otherwise in *Andrew* v. *Failsworth Industrial Society* (2), where the man was struck by lightning when engaged upon a scaffold in laying bricks at a height of over 20 feet from the ground. So in *Knyvett* v. *Wilkinson Bros., Ld.* (3), where a man was

(1) 1 B. W. C. C. 194.
(2) [1904] 2 K. B. 32.
(3) 11 B. W. C. C. 50.

in course of his duty collecting debts and was killed by a bomb from an enemy aircraft in the street, that case was decided not to be within the Act; and a similar result was reached in *Allcock* v. *Rogers* (1), in the case of a man killed by a bomb while cleaning a brass plate on a door in the street, for there was no evidence of any special danger attaching to the spot where the man was told to work. Then in *George Anderson & Co.* (1905) v. *Adamson* (2), in the case of a man who was placed by his work at a disadvantage in protecting himself, it was held that there was evidence to support a finding in favour of the workman. In *Allcock* v. *Rogers* (1) it is recognized that if a workman is called by his duty to face street risks, he is protected by the Act if the accident arises from such risks, such as collisions, as indeed was decided in *Dennis* v. *A. J. White & Co.* (3) Slipping on ice on the pavement while walking along in the course of duty has been similarly accepted as giving a right to compensation: *White* v. *W. & T. Avery, Ld.* (4)

In *Allcock* v. *Rogers* (5) Lord Wrenbury propounds a test: "In the course of his employment this man was in a certain place. Was there any evidence that it was a dangerous place? For the present purpose a dangerous place is a place which as a place is dangerous—a place which has some quality which results in danger, for instance, that an insecure wall, which may fall, exists there." Applying the above rules to the case before them, the House, as already stated, negatived the right to compensation.

In the present case it would seem that there was no evidence that the injury suffered by the deceased was caused by an accident arising out of his employment, for it cannot be surmised in general that passing along a road involves a general risk of falling trees. Such an incident can occur, but only if the forces of nature are exercised upon the tree, and to such a mishap all persons in the locality are liable. Fletcher

(1) 11 B. W. C. C. 149; [1918] W. N. 96.
(2) 1913 S. C. 1038 6 B. W. C. C. 874.
(3) [1917] A. C. 479.
(4) (1915) 9 B. W. C. C. 663.
(5) 11 B. W. C. C. 149, 153.

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Moulton L.J. said, in *Warner* v. *Couchman* (1): "It is true that when we deal with the effect of natural causes affecting a considerable area, such as severe weather, we are entitled and bound to consider whether the accident arose out of the employment or was merely a consequence of the severity of the weather to which persons in the locality, and whether so employed or not, were equally liable. If it is the latter, it does not arise 'out of the employment,' because the man is not specially affected by the severity of the weather by reason of his employment." Again (see per Lord Wrenbury in *Allcock* v. *Rogers* (2)), there is no evidence that the road where the accident occurred had any quality which made it more dangerous than any other place; unless the presence of trees adjacent to the road is to be deemed a standing danger. The only evidence was that danger resulted in the place, but not that it resulted from any danger connected with the road as a road.

Reverting to *Dennis* v. *A. J. White & Co.* (3), that decision appears to have turned upon this, that the boy was directed to go on the bicycle to fetch some plaster—the errand and the mode of executing it were directed by his employers. "As soon as it is established that the work itself involves exposure to the perils of the streets the workman can recover for any injury so occasioned": see per Viscount Finlay L.C. (4) He adds that there are cases in which it is necessary to inquire whether the nature of the employment specially exposes a workman to a risk of a general nature. Where the risk is one shared by all men, whether in or out of the employment, in order to show that the accident arose out of the employment, it must be established that special exposure to it is involved (5), and in his closer application of that principle to the case before him his words are: "But when a workman is sent into the street on his master's business, whether it be occasionally or habitually, his employment necessarily involves exposure to the risks of the streets and injury from

(1) [1911] 1 K. B. 351, 357.
(2) 11 B. W. C. C. 149, 153.
(3) [1917] A. C. 479.
(4) [1917] A. C. 479, 482.
(5) [1917] A. C. 482, 483.

such a cause arises out of his employment." Lord Parker (1), dealing with this class of cases, says the contrast is between persons engaged in the particular employment, or under the particular circumstances, and persons not so employed, or not so employed under the same circumstances.

Now in the present case Lawrence chose his own means of locomotion. He might have gone by train, or in some cases in a horse vehicle, or walked. I cannot find any evidence that he was directed to travel in a manner that necessarily exposed him to this risk.

Applying the reasoning in the speeches of the learned Lords in *Dennis* v. *A. J. White & Co.* (2), it appears to differentiate the present case from the one before them. Owing to the manner, method, and time of transit which Lawrence himself selected, he chanced to be on this road where, owing to the forces of nature which happened to be expended on the tree, he was involved in its fall and suffered injuries; but there appears to be lacking any direction by his employers which caused him to be where he was at that moment.

Dennis v. *A. J. White & Co.* (2) was decided in June, 1917, after *Thom or Simpson* v. *Sinclair* (3) (March, 1917), which is referred to in the Lord Chancellor's speech in *Dennis* v. *A. J. White & Co.* (4) The latter case, therefore, must be taken to embody the principles laid down in *Thom or Simpson* v. *Sinclair*. (3) In *Thom or Simpson* v. *Sinclair* (3) the workgirl was obliged, by the conditions of her employment, to be in a particular building which as a place was dangerous and subjected her to the risk of the particular accident that befell her. Certain principles are stated by Lord Haldane for guidance as to the interpretation of the Act. He holds that the doctrine whereby it is said that an injury by accident arises out of the employment, if injury has been inflicted on the workman by any accident, such as something falling upon him, which would not have happened to him if his employment had not caused him to be in the place at which the accident occurred at the time of its occurrence, the place and time having thus been

(1) [1917] A. C. 492.
(2) [1917] A. C. 479.
(3) [1917] A. C. 127.
(4) [1917] A. C. 479, 482.

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conditions of the result brought into existence by the employment, is too vague. He says that a further condition seems to be required; a condition that the injury should have arisen not merely by reason of presence in a particular spot at a particular time, but because of some special circumstance attending the employment of the workman there, in other words, his duty calling him there. In his conclusion upon the facts of the case before him, Lord Haldane said (1): "It is enough that by the terms of her employment the appellant had to work in this particular shed and was in consequence injured by an accident which happened to the roof of the shed." Lord Shaw (2) says that the expression "arising out of the employment" applies "to the employment as such—to its nature, its conditions, its obligations, and its incidents. If by reason of any of these the workman is brought within the zone of special danger and so injured or killed, it appears to me that the broad words of the statute 'arising out of the employment' apply."

Once more testing the facts of the present case by the above rules, I do not find it possible to hold that Lawrence met with this accident by reason of any of the four facets of his employment above stated.

The cases of *Upton* v. *Great Central Ry. Co.* (3), where the workman was sent from station A to station B to do some work and on his return journey met with an accident at station B, and *Dennis* v. *A. J. White & Co.* (4), where the boy was sent on an errand on his bicycle in the streets, both contain a direction from the employers, which is absent in the present case. Lawrence was where he was because of his own free will. He laid out his plans and methods and times as he pleased. He rode homewards, if that is the right inference, when he did, and by the route that he selected, not under any orders of his employers. He was not acting in execution of any particular duty. If liability for the accident is laid upon his employers, they would be rendered his insurers against almost any personal accident which he might incur

(1) [1917] A. C. 127, 136.
(2) Ibid. 142.
(3) [1924] A. C. 302.
(4) [1917] A. C. 479.

during the whole subsistence of the agreement of February 11, 1927, except during such time as he was actually within his own curtilage.

Upon the question whether the point under discussion is one of fact or law, I think the observations of Viscount Finlay in *Dennis* v. *A. J. White & Co.* (1) are conclusive. The question is whether on the facts proved and recorded by the county court judge the accident arose out of the employment. The Lord Chancellor adds that this is not a question of fact but of law. This Court can, therefore, review the conclusion of the county court judge, and, in my judgment, ought to do so. I must add that I have found the case a very difficult one and have hesitated long in coming to the above conclusion ; more especially as I am not in accord with my colleagues. But I feel bound to express my opinion as above because of the absence of any direction or duty chargeable to the employers. On all other points, and on their general view of the law and the decisions, I am in agreement with them.

SANKEY L.J. The facts of this case, as found by the learned county court judge, are as follows. The deceased was employed as a commercial traveller by the appellants, who are coal merchants, and while returning from a journey on which he had been engaged for them on October 28, 1927, he was struck on the road while he was riding a motor cycle and side car by a falling tree, which was blown down by a severe gale which prevailed that night, and seriously injured. He was discovered in the road under the branches of the tree a little way from the road by a motor cyclist, who himself came into collision with the tree, which had fallen not long before. He was extracted and died in the hospital in Bridgnorth on November 2. The widow, who brought these proceedings, alleges that he was a workman under the Workmen's Compensation Act, and that she is entitled to recover from his employers.

Four points were taken by the employers : (1.) That the applicant was not totally dependent. (2.) That the deceased

(1) [1917] A. C. 479, 489.

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was not a workman, because of the amount of his wages or remuneration. (3.) That the accident did not arise in the course of his employment; and (4.) that it did not arise out of his employment. The learned judge found for the applicant on all points, and from his award this appeal is brought.

With regard to the first two points, I am of opinion that the facts justify his finding and desire to say no more upon them.

The questions then which fall for determination are: (1.) Did the accident arise in the course of the deceased's employment, and (2.) Did it arise out of his employment? There have been a very large number of cases decided on these two points, some of which are very difficult to reconcile with others, a situation which was bound to arise when it became necessary for the Courts to apply a few words, "accident arising out of and in the course of," to a great variety of employments and circumstances. Quite early in the case law on the subject two lines of authority began to emerge, amongst many others, the first being where the personal injury to the workman was caused by an accident resulting from the forces of nature; the second being where the personal injury arose from the ordinary risks incurred by the workman when in a street or public place. With regard to the first of these cases—namely, accidents arising from the forces of nature, the rule appears to have been established that to enable the workman or his dependants to succeed it was necessary to prove that the position he was in in the course of his employment subjected him to more than an ordinary risk of being injured. This rule was established in the English, Irish and Scottish Courts of Appeal in what may be conveniently classified as the lightning or heat cases; for example, in the English Court of Appeal in *Andrew* v. *Failsworth Industrial Society* (1), where the man was struck by lightning while working in a place where he was subject to more than an ordinary risk of being struck. A similar case would be a steeplejack at the top of a steeple in a storm. The converse case where the doctrine was

(1) [1904] 2 K. B. 32.

established in the Irish Court of Appeal was in *Kelly* v. *Kerry County Council* (1), in 1908, where it was held that the workman in question, who was struck by lightning, was not in a position where he was subjected to more than an ordinary risk of being struck. In the Scottish Court of Appeal there was the case of *Robson, Eckford & Co.* v. *Blakey* (2) in 1911, where the bending position in which the workman was at the time he was seized with heat apoplexy rendered him more liable in hot weather to be so seized. The liability for accidents arising from the ordinary risk of the streets and public places proceeds upon the ground that where in the course of the man's employment he has to incur the risk of such accidents, personal injury caused by them arises out of his employment. This was the effect of the decision of the House of Lords in *Dennis* v. *A. J. White & Co.* (3) Lord Finlay L.C. says (4): "Where the risk is one shared by all men, whether in or out of employment, in order to show that the accident arose out of the employment it must be established that special exposure to it is involved. But when a workman is sent into the street on his master's business, whether it be occasionally or habitually, his employment necessarily involves exposure to the risks of the streets and injury from such a cause arises out of his employment. There is nothing in the Act about any necessity for showing that the employment involves an extra or special risk, and once it is clear, as it is in the present case, that the accident was the result of a risk necessarily incidental to the performance of the servant's work, all inquiry as to the frequency or magnitude of the risk is irrelevant. It is quite immaterial whether the nature of the employment involves continuous or only occasional exposure to the dangers of the streets. The frequency of the exposure to a risk increases the chance of the occurrence of an accident, but it has no bearing on the question whether it arose out of the employment, which is settled by the fact that such exposure was one of its terms whether on many occasions or on one."

(1) 1 B. W. C. C. 194.
(2) (1911) 5 B. W. C. C. 536.
(3) [1917] A. C. 479; 10 B. W. C. C. 280.
(4) [1917] A. C. 479, 482.

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The lines and the reasons upon which all these decisions proceed are fairly clear, and if one had to look to this class of decisions only, there might be a difficulty in supporting the judgment of the learned judge in saying that the accident arose out of the employment of the deceased in this case, for it is not easy to say that there was any evidence which showed that he was subjected to more than an ordinary risk of being struck by the falling tree. The difficulty in the present case is that it partakes in some measure of both classes of case above referred to, that is to say, that to some extent the street accident and to some extent the forces of nature accident cases apply to it. The principle applicable to it may to some extent be deduced from the case of *Thomor Simpson* v. *Sinclair*. (1) That case was decided by the House of Lords on March 8, 1917, whereas *Dennis* v. *A. J. White & Co.* (2) was decided by the same tribunal on June 14, 1917. It appears to me that it made some modification in the reasoning and would probably have caused some difference in the results of cases decided previously to it.

With regard to the forces of nature cases, Lord Haldane seems to draw a distinction between the accident which arises directly, say, for the sake of example, from a stroke of lightning, or indirectly in this sense that the stroke of lightning brings about a collapse of a wall which falls upon and so causes the personal injury to the workman. He says (3): "Whether the remoter cause of the roof falling was the collapse of a neighbouring wall, or the falling down of some high adjacent building, or a stroke of lightning, seems to me immaterial in the light of this construction. It is enough that, by the terms of her employment, the appellant had to work in this particular shed and was in consequence injured by an accident which happened to the roof of the shed. The accident is one arising out of the employment not the less if ultimately caused by the fall of some one else's wall than if it had been caused by inherent weakness of the employer's roof."

(1) [1917] A. C. 127; 10 B. W. C. C. 220.

(2) [1917] A. C. 479.

(3) [1917] A. C. 127, 136.

With regard to the street accident cases, the decision emphasizes the importance of locality in considering whether the accident arose in the course of a man's employment. Lord Haldane says (1): "But where a man is ordered to work under a particular roof and that roof falls in on him, it is not clear that the accident belongs to that category. If the particular accident would not have happened to him had he not been employed to work under the particular roof, there seems to be nothing in the language of the Act which precludes an occurrence from being held within it which satisfies the test proposed by the first of the alternative constructions modified to the extent I have suggested. The falling of the particular roof could only happen in one place, and the presence there of the person injured was due to the employment. The question really turns on the character of the causation through the employment which is required by the words 'arising out of.' Now it is to be observed that it is the employment which is pointed to as to be the distinctive cause, and not any particular kind of physical occurrence. The condition is that the employment is to give rise to the circumstance of injury by accident. If, therefore, the statute, when read as a whole excludes the necessity of looking for remoter causes, such as some failure in duty on the part of the employer as a condition of his liability, and treats him rather as in a position analogous to that of a mere insurer, the question becomes a simple one. Has the accident arisen because the claimant was employed in the particular spot on which the roof fell? If so, the accident has arisen out of the employment, and there is no necessity to go back in the search for causes to anything more remote than the immediate event, the mere fall of the roof, and there need be no other connection between what happened and the nature of the work in which the injured person was engaged." Again Lord Shaw says (2): "My Lords, the cases above cited, nine in number, are in truth all what might be termed 'location' cases, and, although there is much variety of expression by the learned judges, I think that they form a

(1) [1917] A. C. 134. (2) [1917] A. C. 127, 144.

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body of authority in support of the construction of the statute which your Lordships are now sanctioning. In each and all it was because of the nature, conditions, obligations or incidents of the employment by which the workman was brought within the zone of special danger that injury by accident was pronounced to have arisen out of the employment," and Lord Parmoor says (1): "The fact that the risk may be common to all mankind does not disentitle a workman to compensation if in the particular case it arises out of the employment. Any stranger walking along a road in a mine may be exposed to the risk of an accidental fall of coal, but this does not affect the claim of a miner who in the course of his duty, or to obtain access to his work, is unfortunately injured by such fall."

The view of the House of Lords in *Sinclair's* case (2) may be summed up as follows. Where death or personal injury results directly from the operation of natural forces, for example, lightning, the dependants of a workman must show that the workman was specially exposed to such forces. Where the death or personal injury does not directly result from natural forces, but from a cause which is induced by some natural force, for example, where lightning knocks down a wall or a storm blows down a tree, and the wall or the tree, as the case may be, causes personal injury at any place to the workman, he is entitled to recover if he was at the time he suffered the injury at the place during the course of his employment.

Applying these cases, I think it may be difficult to divide the question for determination into two watertight compartments; but having regard to the fact that the tree fell upon the deceased, I do not think it is necessary to go into the remoter question what caused the tree to fall upon him, and having regard to the fact that the incidence of the man's employment brought him within the zone of special danger, I am of opinion that the judge was right in finding that the accident arose out of and in the course of the employment, and that the appeal should be dismissed.

(1) [1917] A. C. 145. (2) [1917] A. C. 127.

I need hardly say that I have reached this conclusion with great diffidence, as my Lord, the Master of the Rolls, holds a contrary opinion; but I think we do not differ on the principles to be applied. His view is that there was no evidence upon which the county court judge could find as he did.

RUSSELL L.J. The relevant facts in this case, as they appear in the evidence and the findings of the judge, are as follows. Mr. Lawrence was employed as a commercial traveller by the appellants, who are coal merchants. On October 28, 1927, he had been engaged on their business collecting accounts and soliciting orders. He had obtained an order in Bridgnorth from one Marston somewhere about 8.30 or 9 P.M., and was returning to his home at Shifnal from Bridgnorth by the proper road. He was driving his motor cycle and side car. While he was passing a particular spot on the road a tree (uprooted and blown down by a gale) fell upon him. He was discovered in the road buried under the fallen tree. He was extricated and died in hospital on November 2. The applicant is his widow.

The employers raised four points before the judge. (1.) That the applicant was not totally dependent. (2.) That the deceased was not a workman. (3.) That the accident did not arise in the course of his employment. (4.) That the accident did not arise out of his employment. On all four points the decision was in favour of the widow.

Upon the appeal before us the argument was almost entirely confined to the fourth point. As to the other three points, Mr. Cave, without abandoning them, did not in fact argue them, but concentrated upon the question whether the accident arose out of the employment. As regards the three first points, I will merely say that in regard to them I can see no reason for suggesting that the decision appealed from is otherwise than correct.

The fourth point, in view of the various authorities, occasions much more difficulty. For an accident to arise out of the employment, some "causal relation" or "causal

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connection" between the accident and the employment must be established. The difficulty is (1.) to determine upon the authorities what character of causal relation or causal connection is sufficient for this purpose, and (2.) to decide whether the facts of a particular case establish a causal connection of the character required.

Upon a consideration of the numerous decisions which were cited to us, the authorities to me seem to establish the following propositions. (1.) If the accident results from a risk which is necessarily incident to the performance of the servant's work, the accident arises out of the employment; all inquiry as to the frequency or magnitude of the risk is irrelevant, and it makes no difference that members of the public face the same risk. That appears to me to be a correct statement of the decision of the House of Lords delivered in *Dennis* v. *A. J. White & Co.* (1) on June 14, 1917. (2.) If a workman is injured by an accident resulting from a risk to which every one is subject, but of which it can be said that the workman runs more than the normal risk, the accident arises out of his employment, because the abnormal risk was necessarily incident to the performance of his work. That appears to me a correct statement of the decision of the Court of Appeal in *Andrew* v. *Failsworth Industrial Society* (2), where a bricklayer in an elevated position on a scaffold was killed by lightning. The proposition also covers the decision in *George Anderson & Co.* (1905), *Ld.* v. *Adamson* (3), where the necessity of the workman to adopt a stooping position at his work caused him to run more than the normal risk. (3.) If a workman is injured in an accident resulting from a risk to which every one is subject but which is not necessarily incident to the performance of his work or to which he is not by his work abnormally subjected, the accident does not arise out of his employment. Thus in *Knyvett* v. *Wilkinson Bros., Ld.* (4), where a traveller was injured by a bomb while walking in the street in the discharge of his duties, it was held that the accident did not arise out of his

(1) [1917] A. C. 479.
(2) [1904] 2 K. B. 32.
(3) 6 B. W. C. C. 874.
(4) 11 B. W. C. C. 50.

employment: and in *Allcock* v. *Rogers* (1) the House of Lords held (on March 21, 1918) that where a potman was injured by a bomb while standing in the street cleaning his employer's brass door-plate, the accident did not arise out of his employment.

In cases falling within the two first propositions, sufficient causal relation or causal connection is established between the accident and the employment. In cases falling within the third proposition, it is not.

The case now under appeal before us cannot, I think, be brought within either of the two first propositions. The risk of being injured or killed by a falling tree was not necessarily incident to the performance of Mr. Lawrence's work; nor can it be said to be a risk to which he was abnormally subjected. The case would fall within the third proposition; and but for the element, to which I now call attention, the accident could not be said to arise out of his employment. The authorities seem to me to establish a fourth proposition—namely, that sufficient causal relation or causal connection between the accident and the employment is established if the man's employment brought him to the particular spot where the accident occurred, and the spot in fact turns out to be a dangerous spot. If such a locality risk is established, then the accident "arises out of" the employment, even though the risk which caused the accident was neither necessarily incident to the performance of the man's work, nor one to which he was abnormally subjected. This fourth proposition is based upon the decision of the House of Lords in *Thom or Simpson* v. *Sinclair* (2) on March 8, 1917. In that case a girl employed as a fish curer was at her work in a shed. A wall on adjoining land and belonging to a third party collapsed from its own instability on to the shed; the shed in consequence fell in and injured the girl. It was held by the House of Lords that the accident arose out of the employment. The causal relation was established, because the employment having brought the worker to the particular spot exposed her to the danger which in fact

(1) 11 B. W. C. C. 149; [1918] W. N. 96. (2) [1917] A. C. 127.

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existed there. Lord Haldane discusses the matter in detail. He considers (1) the two rival contentions as to the meaning of the words "arising out of the employment." The first contention was expressed thus: "According to one of them the language used is satisfied if injury has been inflicted on the workman by any accident, such as something falling on him, which would not have happened to him if his employment had not caused him to be in the place at which the accident occurred at the time of its occurrence, the place and time having thus been conditions of the result brought into existence by the employment. Once establish this and it is said that no further causal connection need be sought." That contention Lord Haldane says is too vague. It seems that this must be so; otherwise I think the two bomb cases (*Knyvett* v. *Wilkinson Bros., Ld.* (2) and *Allcock* v. *Rogers* (3)) must have been decided differently. The second contention ran thus (4): "Unless . . . . the accident was due to something the man was doing in the course of his employment or was exposed to as a peculiar danger by the nature of his employment, the conditions required by the statute are not fulfilled." That, according to Lord Haldane, is too strict. Indeed it seems clear that if the second contention were correct, the decision in *Thom or Simpson* v. *Sinclair* (5) itself must have been the other way. The view adopted and applied in *Thom or Simpson* v. *Sinclair* (5) appears to me to be this: If the accident has occurred to the workman by reason of the employment bringing about his presence at the particular spot and so exposing him to a danger which in fact is proved to exist at that particular spot, then the accident arises out of the employment. That I believe to represent correctly the effect of the decision in *Thom or Simpson* v. *Sinclair*. (5) I will refer to some passages in the speeches, and then apply their language to the present case. Lord Haldane says (6): "Has the accident arisen because the claimant was employed in the particular spot on which

(1) [1917] A. C. 133.
(2) 11 B. W. C. C. 50.
(3) 11 B. W. C. C. 149; [1918] W. N. 96.
(4) [1917] A. C. 127, 134.
(5) Ibid. 127.
(6) Ibid. 135.

the roof fell? If so, the accident has arisen out of the employment, and there is no necessity to go back in the search for causes to anything more remote than the immediate event, the mere fall of the roof, and there need be no other connection between what happened and the nature of the work in which the injured person was engaged." Later on he says (1): "If, therefore, the language in question were to be construed upon principle and apart from authorities I should be prepared to hold that it was satisfied where, as here, it has been established as a fact that it was as arising out of her employment that the appellant was under the roof by the falling in of which she was injured. Behind the fact that the roof fell we cannot go. The limiting words in the Act do not refer to any act of negligence on the part of the employer as to be looked for, but simply to a restriction of the class of accident against which he is to provide insurance. The appellant was injured because she happened at the moment of the accident to be working in the shed where she was employed to work, and I think that, unless authority constrains us to hold the contrary, the Act ought to be construed as signifying that an accident such as this comes within the class against which she is insured. Whether the remoter cause of the roof falling was the collapse of a neighbouring wall, or the falling down of some high adjacent building, or a stroke of lightning, seems to me immaterial in the light of this construction. It is enough that by the terms of her employment the appellant had to work in this particular shed and was in consequence injured by an accident which happened to the roof of the shed. The accident is one arising out of the employment not the less if ultimately caused by the fall of some one else's wall than if it had been caused by inherent weakness of the employer's roof." Lord Shaw says (2): "In short, my view of the statute is that the expression 'arising out of the employment' is not confined to the mere 'nature of the employment.' The expression, in my opinion, applies to the employment as such—to its nature, its conditions, its obligations, and its

(1) [1917] A. C. 127, 136. (2) [1917] A. C. 142.

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incidents. If by reason of any of these the workman is brought within the zone of special danger and so injured or killed, it appears to me that the broad words of the statute 'arising out of the employment' apply." Then, after citing numerous authorities, he says (1): "My Lords, the cases above cited, nine in number, are in truth all what might be termed 'location' cases, and although there is much variety of expression by the learned judges, I think that they form a body of authority in support of the construction of the statute which your Lordships are now sanctioning. In each and all it was because of the nature, conditions, obligations, or incidents of the employment by which the workman was brought within the zone of special danger that injury by accident was pronounced to have arisen out of the employment."

In this case of Mr. Lawrence, the accident arose because his employment took him to the particular spot on which the tree fell. The immediate event, the fall of the tree, is sufficient; there need be no other connection between what happened and the nature of Mr. Lawrence's work. It was as arising out of his employment that Mr. Lawrence was within reach of the tree by the falling of which he was injured. Behind the fact that the tree fell we cannot go; whether the remoter cause was a violent wind seems immaterial. By reason of the nature, conditions, obligations, or incidents of Mr. Lawrence's employment, he was brought within the zone of special danger—the accident to him which happened there arose out of his employment.

In *Allcock* v. *Rogers* (2) the House of Lords on March 21, 1918, affirmed the decision of the Court of Appeal on the ground that there was no locality risk. *Thom or Simpson* v. *Sinclair* (3) was cited, and the principle of that decision is embodied in, and indeed specifically referred to in the speech of Lord Wrenbury, when he uses this language (4): "In the course of his employment this man was in a certain place. Was there any evidence that it was a dangerous place? For

(1) [1917] A. C. 144.
(2) 11 B. W. C. C. 149; [1918] W. N. 96.
(3) [1917] A. C. 127.
(4) 11 B. W. C. C. 149, 153.

the present purpose a dangerous place is a place which as a place is dangerous—a place which has some quality which results in danger, for instance, that an insecure wall, which may fall, exists there. If this is so it does not matter whether any one knew or anticipated that it was dangerous. . . . . This place was not by any evidence shown to be a dangerous place ; there is no evidence that it had any quality which made it more dangerous than any other place. The only evidence is that danger resulted in the place, but not that it resulted from any danger connected with the place, as a place. *Thom or Simpson* v. *Sinclair* (1), in my opinion, does not apply."

The result is that in my opinion Mr. Lawrence's case falls within my fourth proposition, which is founded on *Thom or Simpson* v. *Sinclair*. (1) His employment brought him to a danger spot, that is to say, a spot which had a quality which resulted in danger ; the lurking danger was the tree. The danger materialised, that is to say, the tree fell. The cause of the fall is immaterial and irrelevant. The falling tree caused injury to him ; this was an accident which arose out of his employment.

The appeal fails.

Appeal dismissed.

Solicitors for appellants : *W. Addiscott & Co., for B. Burrell Davis, Cannock.*

Solicitors for respondent : *Berrymans, for T. Haynes Duffell, Birmingham.*

(1) [1917] A. C. 127.

W. I. C.

1928
May 1.

RATKINSKY *v.* JACOBS.

Landlord and Tenant—Rent Restriction—Decontrol—Whole Dwelling-house coming into Landlord's Possession—Part subsequently let—Rent and Mortgage Interest Restrictions Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 2, *sub-s.* 1.

Where a landlord comes into possession of the whole of a dwelling-house, which is thereby decontrolled under s. 2, sub-s. 1, of the Rent and Mortgage Interest Restrictions Act, 1923, and subsequently lets a part of the house, the part so let remains decontrolled, and the tenant cannot claim protection under the provisions of the Rent Restriction Acts.

Cohen v. *Gold* [1927] 1 K. B. 865 and *Lloyd* v. *Cook* [1928] 2 K. B. 364 discussed and not followed.

APPEAL from Shoreditch County Court.

The plaintiff's father had been the owner of a dwelling-house, 80 Cazenove Road, Stoke Newington. He had bought the house in 1917 and had let four rooms and a scullery to one Cohen, he and his family residing in the rest of the house. Cohen gave up possession in February, 1926, and the plaintiff's father came into possession of the rooms which had been occupied by Cohen, and then had the whole house in his possession. In May, 1926, he let to the defendant three of the rooms which had previously been let to Cohen, and one room which he had then occupied himself. In February, 1927, he sold the house to his son, the plaintiff in the action. On November 21, 1927, the plaintiff served notice to quit on the defendant, who claimed to be protected by the Rent Restriction Acts. The plaintiff thereupon brought an action for possession. The county court judge held that the premises were decontrolled under s. 2, sub-s. 1, of the Rent and Mortgage Interest Restrictions Act, 1923, and made an order for possession. (1)

The defendant appealed.

D. Weitzman for the appellant.

A. Jackson for the respondent.

(1) Rent and Mortgage Interest Restrictions Act, 1923, s. 2, sub-s. 1: "Where the landlord of a dwelling-house to which the principal Act applies is in possession of the whole of the dwelling-house at the passing of this Act, or comes into possession of the whole of the dwelling-house at

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BRANSON J. This is an appeal from a decision of the judge of the Shoreditch County Court, who found for the plaintiff in the following circumstances.

[The learned judge stated the facts and continued :] The county court judge held that the plaintiff was entitled to possession. He said that it was admitted that three of the rooms now occupied by the defendant became decontrolled in February, 1926, and that he decided that the fourth room also was decontrolled, because at the time when the Act of 1923 came into operation it was in the possession of the landlord. He made an order for possession in three weeks. From that decision the defendant appeals, and the question is whether the county court judge was right in holding that these four rooms were decontrolled.

Mr. Weitzman for the appellant relied very strongly on the authorities of *Cohen* v. *Gold* (1) and *Lloyd* v. *Cook* (2), and I think it right to say that if those cases were correctly decided the county court judge here was wrong. I see no means of distinguishing *Lloyd* v. *Cook* (2) from the present case, though it might be possible to distinguish *Cohen* v. *Gold.* (1) If the matter rested there, I should be inclined to follow the practice of this Court and to say that, whatever my own personal opinion on the correctness of the decisions might be, I should feel it right to follow the decisions already given, but the position does not remain there. Authorities have been cited to us which are not consistent with either decision —authorities two of which are judgments of a Divisional Court and one a decision of the Court of Appeal. Those authorities are, taking them in order of date, *Prout* v. *Hunter* (3) ; *Finey* v. *Gougoltz* (4) ; and *Brooks* v. *Liffen.* (5).

There being, then, those two lines of authorities, which to my mind are inconsistent, it becomes my duty to express my own opinion on the construction of the statute, and to

any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house . . . . ."

(1) [1927] 1 K. B. 865.
(2) [1928] 2 K. B. 364.
(3) [1924] 2 K. B. 736.
(4) [1926] 2 K. B. 322.
(5) [1928] 1 K. B. 441.

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decide for myself the point raised. The decision of the case depends primarily on the true construction of s. 2, sub-s. 1, of the Rent and Mortgage Interest Restrictions Act, 1923. [His Lordship read the sub-section and continued :] Applying the language of that section to the facts of this case as found by the county court judge, it appears that, in regard to the whole of the house with the exception of the four rooms let to Cohen, the owner was in possession at the date of the passing of the Act, and with regard to the four rooms let to Cohen, the owner and landlord came into possession after the passing of the Act—namely, in February, 1926. When Cohen had gone, therefore, the whole of the house was in the possession of the landlord, and it seems to me that unless one is to depart from the ordinary meaning of the language used, the sub-section applies exactly to the situation created, and the result is that the principal Act ceases to apply to that house. It was decided by the Court of Appeal in *Prout* v. *Hunter* (1) that the Acts apply to things and not persons—that they operate in rem and not in personam. If that is correct, the Act, having operated in rem on that house has decontrolled that part which was in the possession of the landlord at the passing of the Act, and also has decontrolled that part which came into the possession of the landlord when Cohen left in 1926, and consequently the whole house has ceased to be subject to the application of the principal Act. How is it suggested that that is not the true position ? It is said, in the first place, that one must not regard that part of the house which was occupied by the owner at the passing of the Act as a dwelling-house, because "dwelling-house" must mean a dwelling-house to which the Act applies, and inasmuch as that part of the house was not let to anybody, there was nobody who was a landlord of it so as to effect decontrol. For that proposition the authority of *Cohen* v. *Gold* (2) is cited. That appears to have been a decision that a person cannot be said to be a landlord in respect of any part of a house which has not been let. I confess that, if that is the true meaning of the language of the sub-section, I find it difficult

(1) [1924] 2 K. B. 736. (2) [1927] 1 K. B. 865.

to see how the first part of the sub-section could have any application. That that is not the real meaning to be given to the language appears from the decision of the Divisional Court in *Brooks* v. *Liffen*. (1) Talbot J., who was a party to the decision in *Cohen* v. *Gold* (2), points out that the word "landlord" is used loosely in the sub-section. Salter J. says: "The word 'landlord' must be loosely used in that sub-section because, strictly speaking, there cannot be a landlord without a tenant and a tenure, and the sub-section deals with a case where there is neither tenant nor tenure. 'Landlord' clearly must mean nothing more than 'owner.'" If landlord means nothing more than owner, why was not that part of the house, which was in the possession of the plaintiff's father, decontrolled—or rather, let me say, taken out of the application of the principal Act? That is my view of the decision in *Cohen* v. *Gold*. (2)

With regard to the case of *Lloyd* v. *Cook* (3), as I understand the decision of the Court, it amounts to this. Three rooms which had been let to a tenant had come back into the possession of the landlord, and had therefore ceased to be within the principal Act; but two of them were subsequently relet to another tenant, and thereby a new dwelling-house was created, which was not a dwelling-house erected or in the course of erection on April 2, 1919, or one which had been bona fide reconstructed so as to come within s. 12, sub-s. 9, of the Act of 1920; and, therefore, the moment that by the reletting of the rooms a new dwelling-house had been created, that dwelling-house fell within the operation of the Act, and the rooms composing it, which had once been decontrolled, ceased to be so, and came again within the principal Act. In the first place, that decision seems to offend against the decision of the Court of Appeal in *Prout* v. *Hunter* (4) by disregarding the principle there laid down that the Acts operate in rem; and, secondly, it is contrary to the decision in *Finey* v. *Gougoltz*. (5) It is perfectly true that the particular

(1) [1928] 1 K. B. 441, 444.
(2) [1927] 1 K. B. 865.
(3) [1928] 2 K. B. 364.
(4) [1924] 2 K. B. 736.
(5) [1926] 2 K. B. 322.

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point taken here was not taken and argued before the Court which decided *Finey* v. *Gougoltz* (1); but the fact remains that that decision must be wrong, if the decision in *Lloyd* v. *Cook* (2) was right. I find it impossible to reconcile the two cases.

Considering, therefore, that the decision in *Finey* v. *Gougoltz* (1), coupled with the decision of the Court of Appeal in *Prout* v. *Hunter* (3) and my own view on the construction of the Act, lead me to the conclusion that the decision of the county court judge was right, I think, in spite of other decisions to the contrary, that it is my duty to hold that this appeal should be dismissed.

MACKINNON J. I agree. At the date of the plaint the plaintiff was the owner of the whole of 80 Cazenove Road and all the rooms it contained. Four rooms therein were let to the defendant, and the plaintiff had served on the defendant notice to quit, and claimed possession of those four rooms. At common law there was no defence to the plaintiff's claim, but the defendant said that his four rooms constituted a "dwelling-house" within the meaning of s. 12, sub-s. 2, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and therefore that, by reason of s. 5 of that Act [re-enacted by s. 4 of the Rent and Mortgage Interest Restrictions Act, 1923] no order for the recovery of possession could be made in respect of them. To that contention the plaintiff replied that the rooms were decontrolled by s. 2, sub-s. 1, of the Act of 1923. He agreed that the Act of 1920 did apply to them, but contended that as his father, who was his predecessor in title, was in possession of one of the rooms let to the defendant at the passing of the Act, and came into possession of the other three rooms after the passing of the Act by the departure of the former tenant Cohen, the Act of 1920 had ceased to apply to the dwelling-house for which the defendant claimed protection. The county court judge decided that that rejoinder of the plaintiff was good and valid.

(1) [1926] 2 K. B. 322. (2) [1928] 2 K. B. 364.
(3) [1924] 2 K. B. 736.

Apart from any authority, I should have thought that there could not be much doubt that the county court judge was right. It seems to me clear that where s. 2, sub-s. 1, of the Act of 1923 speaks of "landlord" it is referring merely to the owner, or the person who, but for the Act of 1920, would be entitled to possession. The section provides: "No order or judgment for the recovery of possession of any dwelling-house to which this Act applies, or for the ejectment of a tenant therefrom shall be made or given," etc., and there are subsequent references to a "landlord" in various places—e.g., in sub-s. (*c*). I think that in s. 2 of the Act of 1923 the terms "landlord" and "tenant" are not used technically, and that "landlord" is not used in the sense of a person who has let a dwelling-house to a tenant, so that there is a relation of tenure between them, but that "landlord" and "tenant" merely mean the parties to whom, but for that section, the provisions of s. 5 of the Act of 1920 would apply. I am encouraged in that view by the consideration that s. 2, sub-s. 1, speaks of a landlord of a dwelling-house being in possession of the whole house at the passing of the Act. If "landlord" is there used in the technical sense, the landlord could be in possession of the dwelling-house at the passing of the Act only if he was in possession in defiance or in breach of the rights of the tenant. There could be no other occasion or means by which any landlord, using the term strictly, could be in possession of a dwelling-house at the date of the passing of the Act.

I am further encouraged in that view by the observations of Salter J. in *Brooks* v. *Liffen* (1) in the passage already cited by Branson J. Taking that view I think it clear that the plaintiff's contention in this case was right, and that the landlord was in possession of one of the rooms subsequently let to the defendant at the passing of the Act and came into possession of the remaining three after the passing of the Act, and that from that date the principal Act ceased to apply to the four rooms or to any of the rooms in the house.

(1) [1928] 1 K. B. 441.

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MacKinnon J.

It was argued on behalf of the appellant that this view is wrong, and reliance was placed principally on *Cohen* v. *Gold* (1), where, as I understand, the other view was taken, that the term "landlord" in this section has a highly technical meaning. Talbot J. there said: "The Act does not apply to a case where possession by the person who is now in fact the landlord was not possession at the material time of a dwelling-house let separately, nor was possession by a landlord; and therefore there was no possession of the whole of the dwelling-house, that is at the passing of the Act of 1923." That followed on an observation by Acton J. in the course of the argument. "How can you say that the plaintiff was the 'landlord' of this dwelling-house at the passing of the Act of 1923, when there was no tenancy existing?" Not only does there seem to me to be a contradiction and a difference between the reasoning in *Cohen* v. *Gold* (1) and that in *Brooks* v. *Liffen* (2), but the principle applied in *Cohen* v. *Gold* (1) seems to me to be inconsistent also, first with the decision in *Oakley* v. *Wilson* (3), in which case the Divisional Court was constituted by the same two judges, and, secondly, with the decision in *Finey* v. *Gougoltz*. (4) If *Cohen* v. *Gold* is right, *Finey* v. *Gougoltz* (4) must, I think, have been wrongly decided. *Finey* v. *Gougoltz* (4) was referred to in the argument for the appellant in *Cohen* v. *Gold* (1), but no reference seems to have been made to it in the judgments.

In these circumstances we are in the position of considering two lines of authority based on inconsistent reasoning, and it is unhappily our duty to say which seems to be correct. I have no doubt, speaking for myself, that the view expressed in *Cohen* v. *Gold* (1), that "landlord" in s. 2, sub-s. 1, of the Act of 1923 has the highly technical meaning of a person who has a tenant, so that a relation of tenure exists between them, is not correct. I think that landlord there means "owner" or one of the two parties to the litigation contemplated by s. 5 of the Act of 1920, and that therefore in

(1) [1927] 1 K. B. 865, 868.
(2) [1928] 1 K. B. 441.
(3) [1927] 2 K. B. 279.
(4) [1926] 2 K. B. 322.

this case the landlord was in possession or had come into possession of the whole house. In my view, therefore, the decision of the county court judge was quite correct, and this appeal ought to be dismissed.

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Appeal dismissed.

Solicitor for appellant: *L. Silkin.*
Solicitors for respondent: *J. Howard Smith & Skelt.*

F. C.

LAKE *v.* CRONIN.

HUNT *v.* CRONIN.

1928
July 20.

Revenue—Betting Duty—"Bookmaker"—Employee of certified Bookmaker—Clerk in Charge of Office with Authority to make Bets up to fixed Amount—Carrying on Business without Certificate—Finance Act, 1926 (16 & 17 *Geo.* 5, *c.* 22), *s.* 15, *sub-s.* 1 (*b*); *s.* 17, *sub-s.* 1 (*b*); *s.* 18.

A bookmaker, who held a bookmaker's certificate and also an entry certificate in respect of certain premises, had in his service at the premises an employee, who received a weekly salary and was the only person employed there. The employee had sole charge of the premises in the absence of the bookmaker, who attended race meetings in other towns during the flat racing season and had on one occasion been absent from the premises for ten days consecutively. Although the employee had no authority to open new accounts in the absence of his employer, he could accept personal bets and bets over the telephone, and he said that he had no responsibility, but answered the telephone and recorded messages. On a certain date the employee when in sole charge of the premises was seen to take two or three bets on the telephone and enter them upon a slip, he himself not holding a bookmaker's certificate. On proof of these facts:—

Held, that the employee carried on business as a "bookmaker" within the meaning of the Finance Act, 1926, s. 18, sub-s. 1, and as he did so without having a certificate he was liable to a penalty under s. 17, sub-s. 1 (*b*).

Robbins v. *Inland Revenue Commissioners* [1920] 2 K. B. 677 and *Graham* v. *Lewis* (1888) 22 Q. B. D. 1 distinguished.

CASE stated by three justices for the county borough of York.

An information was preferred by Charles William Joseph Cronin (hereinafter called "the respondent") under the Finance Act, 1926, against Lawrence Lake (hereinafter called

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"the appellant"), for that the appellant of 11 Wenlock Terrace, York, on October 5, 1927, at the borough of York did carry on business as a bookmaker without having in force a proper certificate, as by s. 15, sub-s. 1 (*b*) (1), of the Finance Act, 1926, was required, whereby and by force of s. 17, sub-s. 1 (*b*) (1), of the Act, the appellant was liable in respect of such offence to an excise penalty of 100*l*.

On February 20, 1928, the information was heard by the justices. At the hearing of the information the following facts were proved or admitted before the justices: (1.) Lewis Lindley Hunt was a bookmaker. He had taken out a bookmaker's certificate and also an entry certificate in respect of the premises at 43B Fossgate, York. (2.) On October 5, 1927, the appellant was in sole charge of the premises, and was seen by the respondent to take two or three bets on the telephone and enter the same upon a slip. The appellant was then asked by the respondent to take out a certificate to carry on the business of a bookmaker under the Finance Act, 1926, and

(1) The Finance Act, 1926, provides:—

Part II.

Betting Duty.

15. (1.) There shall .... be charged, levied and paid the following duties of excise, that is to say:— ....

(*b*) On a certificate (in this Part of this Act referred to as "a bookmaker's certificate") to be taken out annually by a person carrying on the business of a bookmaker, a duty of 10*l*.; ....

(3.) Betting duty shall be payable by the bookmaker with whom the bet is made, and every bookmaker .... with whom a bet is made shall immediately on the making of the bet issue to the person by whom the bet is made a ticket (not before used) in the prescribed form denoting that the proper betting duty has been paid (in this Part of this Act referred to as "a revenue ticket").

17. (1.) If any person—

(*a*) Contravenes or fails to comply with any of the provisions of this Part of this Act or of any regulations made thereunder; or

(*b*) carries on business as a bookmaker without having in force a proper certificate; ....

he shall .... be liable, in respect of each offence, to an excise penalty of 100*l*.

18. (1.) In this Part of this Act, unless the context otherwise requires— ....

The expression "bet" means a bet on an event of any kind;

The expression "bookmaker" means any person who, whether on his own account or as servant or agent to any other person, carries on, whether occasionally or regularly, the business of receiving or negotiating bets, or who in any manner holds himself out or permits himself to be held out in any manner as a person who receives or negotiates bets. ....

asked for a week's grace to find out if this was necessary. (3.) On October 22, 1927, a letter from the Commissioners of Customs and Excise was forwarded to the appellant telling him that a certificate was necessary. (4.) No one else was employed at the premises except the appellant, who was an employee of Hunt upon a weekly salary basis and had sole charge of the premises in the absence of Hunt, who attended race meetings in other towns during the flat racing season. At one period Hunt had been absent from the premises for ten days consecutively. (5.) The appellant admitted that, though he had no authority to open new accounts with any person in the absence of Hunt, he could accept personal bets and bets over the telephone up to a certain amount fixed by Hunt, and had no responsibility, but he answered the telephone and recorded messages. (6.) On the part of the respondent it was contended that the appellant was a bookmaker within the meaning of s. 18 of the Finance Act, 1926, and that if he was receiving or negotiating bets for the man Hunt, which was admitted, and had no certificate, he should be convicted. (7.) On behalf of the appellant it was contended that a person, simply because he took instructions over the telephone in regard to transactions and wrote them on a piece of paper, could not be carrying on the business of a bookmaker under the definition under the Act. The Act did not say a person who received or negotiated bets should hold a certificate, but a person who carried on the business of receiving or negotiating bets, and that the appellant was merely taking bets as the man Hunt's clerk. (8.) Reference was made to the circular on betting duty issued by the Commissioners of Customs and Excise dated October 11, 1926, and numbered 129, para. 5 of which read: "Persons employed by and under the direction of bookmakers in a merely subordinate and mechanical capacity (such as clerks, telephone operators, messengers, etc.) are not required to take out personal certificates."

The justices were of the opinion that the respondent's contention was correct and that the appellant did carry on business as a bookmaker without having in force a proper

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certificate, and was so brought within s. 18 of the Finance Act, 1926, and they accordingly fined the appellant 10*l*.

The question for the Court was whether, upon the above statement of facts, the justices came to a correct determination in law, and, if not, what should be done in the premises.

Birkett K.C. (*Bertram Long* with him) for the appellant. The justices were wrong in holding that the appellant carried on business as a "bookmaker" within the meaning of s. 18, sub-s. 1, of the Finance Act, 1926 (1), and, therefore, as he had not a certificate that he was liable to a penalty under s. 17, sub-s. 1 (*b*). (1) The appellant was not a "bookmaker" within the meaning of s. 18, sub-s. 1. (1) That sub-section provides that that term means "any person who whether on his own account or as servant or agent to any other person, carries on, whether occasionally or regularly, the business of receiving or negotiating bets." The appellant did not either on his own account or as servant or agent to any other person carry on the business of receiving or negotiating bets. The appellant did not carry on the business of receiving or negotiating bets at all within the meaning of the sub-section. In order that a person should carry on a business within the meaning of the sub-section, the business carried on must be his own business. The appellant had no business of his own at the premises in question. The only business carried on there was that of his employer, Hunt. That business was carried on at Hunt's premises, and he held the bookmaker's personal certificate and the entry certificate in respect of the premises. All bets were made with Hunt, and he paid the betting duty under s. 15, sub-s. 3. The appellant did not carry on the business by acting in it on behalf of his employer, Hunt. Further, the appellant did not carry on the business as servant or agent to Hunt within the meaning of the sub-section. In order that a person may carry on a business as servant or agent to another person he must be invested with an authority to carry it on as complete as that of the owner of the business himself. If his authority falls short of that he does not carry

(1) See note (1) ante, p. 32.

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on the business. Thus, a clerk employed by a solicitor at his office does not carry on the business : *Graham* v. *Lewis* (1) ; and even a person who under a contract between himself and a foreign company was bound to give his whole time to selling their goods in this country was held not to carry on a trade or business : *Robbins* v. *Inland Revenue Commissioners*. (2) The employee of a bookmaker is not his servant or agent for the purpose of carrying on his business unless he has authority to do everything connected with the business. Ordinarily he is engaged to be present in the office and to do clerical work, but not to receive or negotiate bets without permission. The appellant was not the servant or agent of Hunt to carry on the business with full authority, but only with a limited authority. He was only engaged by Hunt at a weekly salary to assist the latter in conducting his business. The fact that he had sole charge of the premises in the absence of Hunt did not imply that he carried on the business which was conducted there. Neither did the fact that he could negotiate bets up to an amount fixed by Hunt imply that he carried on the business. If the appellant by reason merely of his being employed by Hunt carried on as servant or agent the business of receiving or negotiating bets, it follows that every clerk, typist or office boy employed by Hunt at the premises would carry on the business of receiving or negotiating bets within the meaning of the section. If the Legislature had intended that a person employed by a bookmaker to assist in carrying on his business should also himself carry on business as a bookmaker it might easily have so provided, but it has not done so. On the facts of the present case the appellant was not a bookmaker within the meaning of the Act.

Sir Boyd Merriman S.-G. and *W. Bowstead* for the respondent were not called upon to argue.

LORD HEWART C.J. This is a case stated by three justices for the county borough of York. An information was preferred by the respondent under the Finance Act, 1926, against the appellant for having on a certain day in October of last

(1) (1888) 22 Q. B. D. 1. (2) [1920] 2 K. B. 677.

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Lord Hewart C.J.

year carried on business as a bookmaker without having in force a proper certificate as required by the Act. The justices held the charge proved and imposed a penalty. The question for this Court is whether the conclusion to which they came was right in law.

The facts of the case are very simple. [His Lordship stated the facts substantially as above set out, observing that it was somewhat difficult to understand what the words of the appellant that he had no responsibility really meant, that the phrase that he could accept bets up to a certain amount fixed by Hunt no doubt imported the alternative that he could decline to accept them, and that it was not easy to put a limit to the discretion which was evidently allowed to the appellant; and his Lordship thereupon continued as follows:] In those circumstances the justices have found that the appellant came within the definition of "bookmaker," which is to be found in s. 18, sub-s. 1, of the Finance Act, 1926. It is there provided that "the expression 'bookmaker' means any person who, whether on his own account or as servant or agent to any other person, carries on, whether occasionally or regularly, the business of receiving or negotiating bets, or who in any manner holds himself out or permits himself to be held out in any manner as a person who receives or negotiates bets." I omit the later part of that definition for the purposes of the present case. It would not be easy to imagine a much more comprehensive definition of the term "bookmaker." A bookmaker is a person who carries on the business of receiving or negotiating bets. It matters not whether he carries on that business on his own account or as servant or agent to any other person, and it matters not whether he carries on that business in any of those capacities occasionally or regularly. He is in any of those events a bookmaker.

Counsel for the appellant has suggested two limitations upon this definition. In the first place he argues that the business which the person accused is carrying on must be his own business and not another's. That suggestion seems to me to be manifestly at variance with the plain words of the

definition "whether on his own account or as servant or agent to any other person." How can the business be his own business if he is carrying it on as servant or agent to another person?

The second suggested limitation is that, if a person is indeed to fulfil the condition required of being a servant or agent to some other person, he must be clothed with an authority so utterly complete as to be, so to say, the duplicate original of the person whose servant or agent he is. Once a restriction is imposed upon his discretion, so that he cannot be said to be the alter ego of the proprietor of the business, then, the argument runs, whatever else he is doing, he is not carrying on the business. Authority is sought to be derived for that proposition from such cases as *Robbins* v. *Inland Revenue Commissioners* (1) and *Graham* v. *Lewis*. (2) With all due respect to the learned counsel who has put forward this ingenious contention, it appears to me that those cases so far from helping his argument are directly contrary to it. The very point of those cases was that within the meaning of the enactments there in question the business must be the business of the person himself who carries it on. Thus, in the former of those cases, Lord Sterndale M.R. said: "It is not his own business that he is carrying on but the business of another"; and a little later, referring to the illustration which had been taken by Rowlatt J., in the Court of first instance, Lord Sterndale said: "Another instance which was mentioned was that of a manager of a multiple shop. He is not carrying on the business of a multiple shop. He is carrying on the business of the owner of the multiple shop so far as his branch is concerned." With those considerations in mind, Lord Sterndale said the only question was: "What was the position of Robbins? Was he a whole time servant, or was he a person carrying on a business of rendering services for commission or of an agent of any description?" Because it was there found that he was a whole time servant, it was found that for the purposes of that Part of the Finance (No. 2) Act, 1915, he could not be said to be carrying on the business. That is not only not this case but the precise opposite of this

(1) [1920] 2 K. B. 677, 678, 683. (2) 22 Q. B. D. 1.

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case, because the enactment in question in this case says that the expression "bookmaker" means any person who, "whether on his own account or as servant or agent to any other person, carries on the business of receiving or negotiating bets." It was said that it was untrue to describe the appellant as carrying on the business of receiving or negotiating bets, because the carrying on of the total business of receiving or negotiating bets would require the unfettered, unimpaired authority of the principal himself. But the passages already cited from the case of *Robbins* v. *Inland Revenue Commissioners* (1) show how devoid of foundation that argument is. What was said in that case was, not that Robbins was not carrying on the business, but that it was not his own business that he was carrying on. It matters not for the purposes of the enactment in question in the present case, the Finance Act, 1926, s. 18, that the business which is being carried on is not the business of the servant or agent; indeed, it would be a contradiction in terms to suppose that a person could carry on his own business in the capacity of servant or agent to any other person. It is further said that at the other end of the scale there are persons employed by bookmakers in a merely subordinate and mechanical capacity. Be it so. It would be incorrect, and manifestly incorrect, to say that those persons were carrying on the business of receiving or negotiating bets.

I think, therefore, that in each case of this kind once the justices rightly apprehend the meaning of this comprehensive definition, the question for them becomes a question of fact—namely, Is it true to say, having regard to the evidence about the authority, the duties, the work, the employment of the defendant, that he is carrying on the business of receiving or negotiating bets as a servant or agent of somebody else? The circumstances may be very various, but upon the materials which were before the justices in the present case I think it is impossible to contend that there was not evidence, and ample evidence, upon which they might say that this appellant at any rate was carrying on

(1) [1920] 2 K. B. 677, 678, 683.

the business. To reiterate the facts already mentioned: The appellant was in sole charge of the premises during the absence of his employer; his employer was away habitually during the flat racing season, which is the material period, and was sometimes away for ten days at a time; and the appellant could accept personal bets and bets over the telephone up to a certain amount (we are not told what it was) fixed by his employer. If the arguments on behalf of the appellant were to prevail, it would follow that a bookmaker could employ an unlimited number of servants or agents in different towns, and as long as he told them that they must not allow any particular account to exceed, say half a million sterling, none of them would satisfy this definition.

In my opinion the justices made no error in law, and this appeal ought therefore to be dismissed.

ACTON J. I agree.

BRANSON J. I agree.

In the second of the above cases—namely, *Hunt* v. *Cronin*—a case was stated by the same justices, from which it appeared that an information was preferred by the above mentioned respondent against the above mentioned L. L. Hunt charging him with aiding and abetting the said Lake to commit the offence with which the latter was charged; and that, on the same facts as were proved or admitted in Lake's case, the justices considered that the charge against Hunt was proved, and imposed upon him a penalty of 25*l.* The same counsel appeared for the respective parties in this case as in Lake's case. It was admitted by counsel for the appellant that in view of the decision now given by this Court in Lake's case Hunt's appeal could not be supported. The Court accordingly dismissed Hunt's appeal also.

Appeals dismissed.

Solicitors for appellant: *J. Tickle & Co., for Pullan, Davies & Co., Leeds.*

Solicitor for respondent: *The Solicitor of Customs and Excise.*

J. R.

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March 21, 22, 23, 26, 27, 28, 29; *May* 2.

LLOYDS BANK, LIMITED *v.* THE CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA.

[1925. L. 376.]

Principal and Agent—Authority to draw Cheques—Fraudulent Exercise of Authority—Banker—Crossed Cheque—Receiving Payment for Customer—Negligence—Conversion—Set-off—Ratification—Estoppel—Indian Statute (Act XXVI. of 1881), *ss.* 9, 131—*Bills of Exchange Act*, 1882 (45 *& 46 Vict. c.* 61), *s.* 82.

The plaintiffs were bankers having a branch office in Bombay. One L., their chief accountant at the Bombay branch, had express authority to draw cheques on other bankers with whom the plaintiffs had an account. He had an account with the defendants, who were bankers in Bombay, and another account with the plaintiffs' Bombay branch. His salary was Rs.1200 a month, which the plaintiffs paid by crediting his account with their Bombay branch. In 1922 he began fraudulently drawing cheques on the plaintiffs' bankers in favour of the defendants, to whom he sent written instructions to place the cheques to the credit of his account with them. Where these cheques had to be countersigned he obtained the second signature by misrepresenting the purpose for which the cheques were drawn. He concealed these frauds for two years by means of false entries in the books of the plaintiffs' Bombay branch. When these fraudulent cheques, nineteen in number, had been cleared and the amounts credited to his account by the defendants, he immediately drew cheques against the balance standing to his credit. Of these last mentioned cheques some were in favour of stockbrokers with whom he had speculative dealings; others he paid to the plaintiffs, either to the credit of his current account with them or in respect of special services to be rendered by them.

The plaintiffs brought an action against the defendants for conversion of the nineteen cheques. The defendants denied the conversion, and pleaded alternatively under the Indian Negotiable Instruments Act (to the same effect as s. 82 of the Bills of Exchange Act, 1882) that they had in good faith and without negligence received payment of the cheques for a customer :—

Held, (1.) that the defendants had converted the cheques.

Morison v. *London County and Westminster Bank* [1914] 3 K. B. 356; *A. L. Underwood, Ld.* v. *Bank of Liverpool and Martins* [1924] 1 K. B. 775 followed.

(2.) That they could not rely upon the Negotiable Instruments Act, because they were put upon inquiry by the facts (*a*) that large sums of money were being transferred to them without any apparent cause; (*b*) that this was being done by cheques signed by one who to their knowledge was an officer of the plaintiffs; (*c*) that these cheques were drawn not upon any banking account of the person signing, but on an account which the plaintiffs had with another bank; (*d*) that the person who signed the cheques, the person who gave directions as to how they should be applied,

and the person to whose credit the defendants were directed to place them, were one and the same person; (*e*) that as soon as the cheques were credited as directed large sums were drawn against them by this person in favour of payees whom the defendants knew to be stockbrokers; and that the defendants were guilty of negligence in dealing with the cheques without inquiry.

Bissell & Co. v. *Fox Brothers & Co.* (1884) 51 L. T. 663; 53 L. T. 193; *Hannan's Lake View Central* v. *Armstrong & Co.* (1900) 5 Com. Cas. 188; *A. L. Underwood, Ld.* v. *Bank of Liverpool and Martins* [1924] 1 K. B. 775 followed.

Principle stated in *Commissioners of Taxation* v. *English, Scottish and Australian Bank* [1920] A. C. 683, 688 applied.

Held, also, upon the facts, that the defendants could not plead that they had been misled by former acts of L., which though irregular were not fraudulent, inasmuch as the defendants had not in fact relied upon those acts and that the acts did not imply that L. was authorized to commit subsequent irregular acts and did not estop the plaintiffs from denying that he was so authorized.

Morison v. *London County and Westminster Bank* [1914] 3 K. B. 356 questioned on this point in view of *Bank of Ireland* v. *Evans' Trustees* (1855) 5 H. L. C. 389.

Held, further, that the defendants could not set off the amount of the cheques repaid to the plaintiffs against the amount of the converted cheques.

APPEAL from the judgment of MacKinnon J.

The action was for the conversion of nineteen cheques, admitted to be the property of the plaintiffs, in the following circumstances :—

Messrs. Cox & Co., before February 5, 1923, when they were incorporated with Lloyds Bank, Ld., were bankers having their head office in London and branch offices at Calcutta, Karachi, Bombay and other places in India. The chief accountant of the Bombay branch was one Thomas David Lawson. Above him in authority were a general manager and two sub-managers. Lawson's powers were defined and conferred on him by a power of attorney in very wide terms. He was authorized by the following clauses :—

"2. To discount negotiate and renew bills of exchange and promissory notes with or without security, to accept deposits, to open and keep drawing deposit and discount accounts, to draw accept make and indorse bills of exchange promissory notes cheques warrants bills of lading delivery orders and other negotiable instruments."

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"13. To make sign seal deliver and indorse all such receipts releases deeds conveyances transfers proxies assurances and instruments whatsoever as the said attorney shall think fit.

"14. To give effectual receipts and discharges for all moneys negotiable instruments goods merchandise or other property of any kind and upon the settlement and discharge of all accounts reckonings and claims whatsoever."

By the terms of the constitution of Cox & Co. and later of Lloyds Bank, Ld., cheques for more than Rs.5000 when signed by one officer of the bank had to be countersigned by a second officer.

Lawson's salary was Rs.1200 a month. He kept three banking accounts, one with the Bombay branch of Cox & Co., another with their head office in London, and a third with the defendants, the Chartered Bank of India, Australia and China, Ld. This last account was in the joint names of himself and his wife. His salary was paid by simply crediting his account with the Bombay branch of Cox & Co.

Some of the events in this case happened before Cox & Co. were incorporated with Lloyds Bank, and some took place afterwards; but for convenience all parties agreed that Cox & Co. and Lloyds Bank should be referred to indifferently as the plaintiffs. The plaintiffs kept an account with the Imperial Bank of India.

Between November, 1921, and May, 1922, certain payments ranging from Rs.687 to Rs.7649 were made from the plaintiffs to Lawson's account with the defendants. These payments, eight in number, were made in pursuance of directions contained in pay slips, which were in the form of receipts addressed to the plaintiffs and signed by Lawson as authorizing the payments. Six of these slips were also signed by Lawson as the person to whose account with the defendants the particular sum was to be paid. The remaining two, however, contained the name of the defendants as the persons to receive the payments, but no direction to whose account they were to be credited. One of them was dated December 15, 1921, and was for Rs.687; the other was dated February 10, 1922,

and was for Rs.4589. In each case Lawson sent to the defendants a letter in the words: "Please pay the amount of the enclosed pay slip" [*so many*] "rupees to the credit of my joint account and oblige Yours truly T. D. Lawson." In fact these two pay slips related to sums to which Lawson was lawfully entitled.

At the end of March, 1922, Lawson began drawing cheques as the representative of the plaintiffs on the Imperial Bank of India for sums in excess of Rs.5000 in the form: "Pay the Chartered Bank of India or order," and crossing and signing them. These cheques had to be countersigned by another officer of the plaintiffs. In order to obtain the signature of the second signatory Lawson used to make out what he called a voucher, intended to represent to the second signatory that the cheque was for a proper and lawful purpose. Between March 30, 1922, and January 21, 1924, he drew in all nineteen of these cheques for sums amounting in the aggregate to Rs.250,000, or 17,044*l.* 15*s.* 2*d.* The first cheque so drawn of this fraudulent series was for Rs.15,000. It was dated March 30, 1922. Having induced another officer of the plaintiffs to countersign this cheque, which the officer did in all innocence, Lawson took or sent the cheque to the defendants with a paying-in slip headed "Chartered Bank of India, Australia and China, 31 March, 1922," and containing the words, "Paid in to the credit of T. D. Lawson joint account the sum of Rs.15,000 only. By self." This slip was then initialed by the defendants' cashier, the cheque was cleared, and the amount of Rs.15,000 was entered to the credit of Lawson's joint account with the defendants, who thus obtained payment of the Rs.15,000 from the Imperial Bank of India. The Rs.15,000 thus diverted was within a few days drawn out again by Lawson for his own purposes, as appears hereafter.

He then took steps to conceal this fraud. It was the practice of the Imperial Bank of India to return every day to the plaintiffs' office the pass book relating to the plaintiffs' account, and on March 31 the Imperial Bank made in this pass book an entry crediting themselves with having paid

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this sum of Rs.15,000. Lawson was the officer whose duty it was to check the pass book with the ledger kept by the plaintiffs relating to their account with the Imperial Bank. In this ledger under the dates March 30, 31, 1920, appeared the entry, "Cheque [No.] 520 Chartered Bank Rs.15,000" credited to the Imperial Bank. At the end of each month the plaintiffs' Bombay branch used to send to their head office in London a statement reconciling entries in the various books kept in Bombay. One of these books, the Bills Margin Account, contained statements of sums received by the Bombay branch from various customers to cover advances agreed to be made by that branch at the customer's request, and of sums paid out by the branch in accordance with their agreements. On March 31 Lawson procured an entry to be made in this account debiting certain customers, the Indian States and Eastern Agency, with a sum of Rs.15,000, "Refund of Margin," falsely representing that the Rs.15,000, which had really been paid into his joint account with the defendants, had become due and had been paid to the Indian States and Eastern Agency. As part of this pretence he made out a cheque upon the Imperial Bank of India in favour of the Indian States and Eastern Agency. An entry of this cheque appeared on the counterfoil of the Imperial Bank cheque book, but the cheque itself was destroyed.

On July 10, 1922, Lawson drew the second fraudulent cheque upon the Imperial Bank. It was for Rs.11,000. Again he induced an officer of the plaintiffs' Bombay branch to countersign the cheque, and sent it to the defendants with a covering letter written upon the plaintiffs' office paper to the following effect: "Please pay the amount of the enclosed cheque for Rs.11,000 to the credit of my joint account, and oblige Yours truly T. D. Lawson." This cheque was placed to the credit of his account on July 10, though it was not cleared till two days later. It brought the amount misappropriated up to Rs.26,000.

Then, in order to counteract the effect of the entry in the Bills Margin Account debiting the Indian States and Eastern Agency with the Rs.15,000 above mentioned, on July 15

he made an entry of Rs.15,000 in the credit column of that account purporting to be a reversal of the former debit entry of Rs.15,000 under the date March 31. And on the same day, July 15, he made out and initialed a voucher authorizing an entry in the ledger kept by the plaintiffs' Bombay branch relating to their account with the Imperial Bank, to the effect that a sum of Rs.15,000 had been paid in by cheque to the credit of that account, and the Imperial Bank was accordingly debited with that sum in the ledger. No such cheque had been paid, and the debit entry was fictitious.

In order that his misapplication of the Rs.26,000 might not appear at the end of the month, he proceeded to make further false entries in the books kept by the Bombay branch. For this purpose he did not make use of the Bills Margin Account, but of another account kept by the Bombay branch. Each of the plaintiffs' branches did business as bankers to the other branches, and in relation to this business two books, or two sets of books, were kept by the Bombay branch; one was called "Branches, Our Account," relating to business done by the Bombay branch as customers, and the other was called "Branches, Their Account," relating to business done by that branch as bankers. Daily statements of account were sent to the Bombay branch of business done by that branch as customers, and early in every month statements, called continuations, were sent to them showing how their account stood at the end of the preceding month. Of business done by the branch as bankers they sent statements, but received none. On July 31, 1922, Lawson made out a credit voucher in favour of the Imperial Bank of India for Rs.26,000. The voucher was stamped "Transfer," and purported to be in respect of a cheque of a firm of M. Rasoolji & Sons, and the amount of Rs.26,000 was entered to the credit of the Imperial Bank in the ledger kept by the plaintiffs' Bombay branch. Then on the same day, July 31, 1922, Lawson made out a debit voucher, headed "Karachi, Our Account," for Rs.26,000, purporting to be the "Amount credited a/c M. Rasoolji & Sons, per K. O. [Karachi Office] "tel. d/d." [telegraphic demand draft], and an entry was accordingly made in the

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Karachi, Our Account, debiting the Karachi branch with that sum. These two entries would have been justified if the facts had been, as the entries appeared to represent, that a sum of Rs.26,000 had been paid into the Karachi branch to be transmitted to the Bombay branch and to be paid by that branch to M. Rasoolji & Sons by means of a cheque upon the Imperial Bank of India. There was an entry of such a cheque on a counterfoil of the Imperial Bank cheque book, but no cheque was to be found. This transaction purporting to be with Rasoolji & Sons was fictitious.

On August 9 Lawson drew the third fraudulent cheque upon the Imperial Bank of India. It was for Rs.17,000. It was countersigned and sent to the defendants with a covering letter, as in the last case, requesting them to place the amount to the credit of his joint account, which they did. On the same day, by means of a credit voucher, as before, he credited the Karachi, Our Account, with Rs.26,000, reversing the entry of July 31, mentioned above; and by means of a debit voucher he caused an entry to be made in the ledger debiting the Imperial Bank of India with Rs.26,000, purporting to be the amount of a "cheque paid in." On August 31, to elude detection, he caused an entry to be made in the ledger crediting the Imperial Bank with having paid Rs.43,000 by cheque to Brunner, Mond & Co. (India), Ld., and on the same day he debited the Calcutta, Our Account, with the same sum, pretending by these entries that Rs.43,000 had been paid to the Calcutta Branch to be transmitted to the Bombay branch for payment by them to Brunner, Mond & Co. (India), Ld., and that this payment had been made by means of a cheque upon the Imperial Bank of India. Again there was an entry of such a cheque on a counterfoil of the Imperial Bank cheque book, but no cheque was to be found. On September 5 he reversed the debit and credit entries of August 9.

By these means, which he used again and again, with slight variations, Lawson had at the end of 1923 defrauded the plaintiffs of Rs.224,000. On January 21, 1924, he drew the nineteenth fraudulent cheque. It was for Rs.26,000, and brought the amount misappropriated up to Rs.250,000. Among the

customers of the plaintiffs' Bombay branch was the Equitable Eastern Corporation of New York. On January 22 Lawson had caused entries to be made in the ledger representing that Rs.250,000 had been paid to the International Banking Corporation, debiting the account of the Equitable Eastern Corporation of New York, and crediting the Imperial Bank of India with having made the payment. On January 26 he sailed from Bombay for England on leave. On February 14, 1924, a statement of account was sent by the Bombay branch to the Equitable Eastern Banking Corporation of New York. On March 21 that corporation sent a cable repudiating the debit of Rs.250,000. It was then found out that the alleged payment of Rs.250,000 by the Imperial Bank to the International Banking Corporation had never been made. These disclosures led to the discovery of the frauds. Lawson was prosecuted, convicted and sentenced for criminal breach of trust as a servant.

On March 30, 1922, before the first fraudulent cheque was paid in to Lawson's account with the defendants, the account was in credit to the amount of Rs.232–8–3. On the day on which the cheque was paid in he drew three cheques, one in favour of his own account with the plaintiffs and two in respect of telegraphic transfers to be effected on his account by them. On April 7 he drew two more cheques in favour of the plaintiffs, apparently to the credit of his account with them. By these seven cheques his account with the defendants was overdrawn to the amount of Rs.385. On June 30 he had a credit balance of Rs.481. On July 12 he paid in the fraudulent cheque for Rs.11,000, and on the same day drew out Rs.10,790 by a cheque payable to certain stockbrokers. On July 27 he drew a cheque for Rs.300 payable to himself, and paid it into his account with the plaintiffs. On August 9 he had a credit balance with the defendants of Rs.330. On August 10 he paid in the fraudulent cheque for Rs.17,000. On the same day he paid out Rs.9435 by cheques payable to stockbrokers. On August 11 he drew one cheque for Rs.6144, and on August 14 another for Rs.300, both for the credit of his account with the plaintiffs. During the period between the end of March, 1922,

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and January 26, 1924, his account with the defendants was rarely in credit to the amount of Rs.1000 immediately before the payment of one of the fraudulent cheques, and as soon as each of the fraudulent cheques was paid in cheques of substantial amounts were drawn against them. Twenty-four of these, amounting in all to Rs.67,352 or 4574*l.*, were paid to the plaintiffs, some of them to procure telegraphic transfers in order to meet cheques drawn on his account with the plaintiffs' London office and falling due, and the rest for other purposes of his own. Of the other cheques drawn against the fraudulent cheques many were in favour of stockbrokers.

In these circumstances the plaintiffs brought an action against the defendants for the wrongful conversion of the nineteen cheques above mentioned, and claimed 17,044*l.* 15*s.* 2*d.* damages. As originally drawn the statement of claim contained an alternative claim for money had and received, but this claim was expressly abandoned during the hearing before this Court. The defendants denied the conversion. Alternatively they pleaded that they were bankers, that Lawson was their customer, and that they in good faith and without negligence received payment for him of the said cheques, which were all crossed generally; and they relied on s. 82 of the Bills of Exchange Act, 1882, s. 1 of the Bills of Exchange (Crossed Cheques) Act, 1906, s. 131 of the Indian Negotiable Instruments Act, 1881 (Act XXVI. of 1881), and Act No. XVIII. of 1922, amending the last mentioned Act. (1)

(1) Negotiable Instruments Act, 1881 (Act XXVI. of 1881), as modified up to September 1, 1909 :—

Sect. 9: "'Holder in due course' means" [among other persons] "the payee or indorsee" of a cheque, "if payable to, or to the order of, a payee, before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title."

Sect. 131: "A banker who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to himself shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment."

Act No. XVIII. of 1922. An Act further to amend the Negotiable Instruments Act, 1881, s. 2: "To s. 131 of the Negotiable Instruments Act, 1881, the following explanation shall be added, namely :—

'Explanation—A banker receives payment of a crossed cheque for a

MacKinnon J. held that the defendants had in good faith received payment of the nineteen cheques for their customer, but that they had failed to discharge the onus of proving that they received the cheques without negligence, and therefore were not protected by the Indian Negotiable Securities Act, 1881, from liability to the plaintiffs, the true owners of the cheques; but that having taken the cheques without any, and therefore with a defective, title they were liable for conversion. But he further held that they were entitled to set off against 17,044*l.* 15*s.* 2*d.*, the value of the converted cheques, so much of the proceeds of the converted cheques as Lawson had subsequently paid into his account with the plaintiffs. This amounted to 4574*l.* 0*s.* 10*d.* Judgment was eventually given for the plaintiffs for 12,470*l.*

The defendants appealed. There was a cross-appeal by the plaintiffs, who claimed the whole 17,044*l.* 15*s.* 2*d.*

Jowitt K.C. and *James Wylie* for the appellants (defendants). The appellants are not liable for conversion of these nineteen cheques. They were payees of the cheques. The cheques were drawn by Lawson, who had express authority to draw cheques, and were countersigned strictly according to the regulations of the respondents. It follows that the appellants' title to the cheques was unimpeachable. As between themselves and the respondents they were dealing with their own property and have committed no conversion. It is true that when Lawson drew the cheques he intended to commit a

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customer within the meaning of this section notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof.'"

Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61):—

Sect. 82: "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

Bills of Exchange (Crossed Cheques) Act, 1906 (6 Edw. 7, c. 17):—

Sect. 1: "A banker receives payment of a crossed cheque for a customer within the meaning of s. 82 of the Bills of Exchange Act, 1882, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof."

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fraud, but that does not affect the title of the appellants, who took the cheques in good faith : *Hambro* v. *Burnand* (1) ; and see the remarkable passage cited in that case from the judgment of Lord Brougham in *Bank of Bengal* v. *Fagan* (2) ; *Clutton* v. *Attenborough & Son* (3), per Lord Shand ; *Lloyd* v. *Grace, Smith & Co.* (4) ; and *Reckitt* v. *Barnett & Co.* (5)

Secondly, the respondents have issued these negotiable instruments, and the appellants have dealt with them bona fide before any intervention by the respondents : *Tate* v. *Wilts and Dorset Bank.* (6)

Thirdly, even if the title to the cheques was defective the appellants are relieved from liability by s. 131 of the Indian Negotiable Instruments Act (XXVI. of 1881), inasmuch as being bankers they have in good faith and without negligence received payment for their customer. It is admitted that they acted with perfect good faith, but the learned judge has held that they did not act without negligence. Negligence in law means a breach of some duty to be careful. The appellants were payees of the cheques and the respondents were the drawers. What duty does the payee of a cheque owe to the drawer ? Surely none beyond the common duty to be true and just in his dealings ; but no breach of that duty has been suggested. The duty is not made more onerous by the fact that the payee is a bank collecting for its customer. When the Indian Act speaks of negligence in a banker in receiving payment for a customer of a crossed cheque—the Bills of Exchange Act, 1882, in s. 82 uses the same language—and speaks of that negligence as involving the banker in a liability towards the owner, in this case the drawers, of the cheque, the difficulty is first to conceive and then to formulate the duty towards the owner of the cheque, a breach of which will render the banker liable. Possibly it may be a duty to follow the usual practice of bankers and to use such precaution as experienced bankers

(1) [1904] 2 K. B. 10.
(2) (1849) 7 Moo. P. C. 61, 74.
(3) [1897] A. C. 90, 95.
(4) [1912] A. C. 716.
(5) [1928] 2 K. B. 244. This decision was reversed in the House of Lords on November 12, 1928.
(6) Unreported (1899) Journal of Institute of Bankers, vol. xx., p. 376.

are accustomed to take, and if he fails to do this and his customer is thereby enabled to misappropriate a cheque the statute may impose upon the banker a liability to indemnify the true owner of the cheque: *Bissell & Co.* v. *Fox Brothers & Co.* (1); *Hannan's Lake View Central* v. *Armstrong & Co.* (2); *Ladbroke & Co.* v. *Todd.* (3) But where the banker is himself the payee of the cheque, who is then the true owner of it? Either the banker himself, in which case the duty is owed to himself, which is absurd, or the drawer. But if the drawer is the true owner, surely on him primarily lies the duty to follow the usual practice and to take the customary precautions when drawing and issuing the cheque: *London Joint Stock Bank* v. *Macmillan.* (4) The learned judge has held that the respondents were negligent in their internal organization, and that it was owing to their negligence that Lawson was enabled to perpetrate the frauds. They can hardly be heard to say: "Through our own laches we have been defrauded by one of our servants into drawing a cheque in your favour. If you had been more astute you would have seen that we were being defrauded, and for failure to discover this you are liable for conversion."

But the appellants can take their stand on less technical grounds. Without relying on the fact that they were payees of the cheques, their real defence is that Lawson having possessed himself of these cheques by fraud had a defective title to them, that is a title which might be defeated by the respondents if they discovered the fraud before, but not after, Lawson had parted with the cheques to a banker who in good faith and without negligence received payment of the cheques for a customer. Then the question is whether the appellants committed any breach of that duty which a banker receiving payment for a customer of a crossed cheque, of which the banker is not the payee, owes to the owner of the cheque: *John* v. *Dodwell & Co.* (5); *Corporation Agencies* v. *Home Bank of Canada.* (6) The learned judge, applying the standard of

(1) 51 L. T. 663; 53 L. T. 193.
(2) 5 Com. Cas. 188.
(3) (1914) 19 Com. Cas. 256.
(4) [1918] A. C. 777.
(5) [1918] A. C. 563.
(6) [1927] A. C. 318.

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care laid down by Bailhache J. in *Ross* v. *London County Westminster and Parr's Bank* (1) and by Lord Dunedin in *Commissioners of Taxation* v. *English, Scottish and Australian Bank* (2), held that there were attending the payment of the cheques to and receipt of them by the appellants circumstances which ought to have excited their suspicion and put them upon inquiry. Those circumstances were the facts that the cheques purported to transfer large sums of money from the respondents to the appellants, that they were drawn by an officer of the respondents and then by him diverted from the natural and ordinary purposes of remittances between bankers and directed to be paid into his own private account, when, if that was the intention of the respondents they might have effected it by the simple method of crediting their officer's account, and that he was dealing with sums of money which did not seem to be warranted by his means so far as they were known. The test of negligence in cases like the present has been laid down by Lord Dunedin in *Commissioners of Taxation* v. *English, Scottish and Australian Bank* (3); it is: Whether the transaction of paying in any given cheque coupled with the circumstances antecedent and present was so out of the ordinary course that it ought to have aroused doubts in the bankers' mind and caused them to make inquiry. Moreover, the question is of the true inference to be drawn from the facts. It is submitted that the learned judge in his analysis has given their full weight to the present circumstances, but has underrated the importance of the antecedent circumstances that between November, 1921, and March, 1922, various payments had been made by the respondents into Lawson's account with the appellants without exciting or deserving any protest or comment whatsoever: *Morison* v. *London County and Westminster Bank.* (4) The appellants were therefore entitled to assume that the later payments were in fact authorized and approved by the respondents. At any rate, they were not negligent in receiving and applying the payments as they did. *Morison* v. *London County and*

(1) [1919] 1 K. B. 678.
(2) [1920] A. C. 683.
(3) [1920] A. C. 683, 688.
(4) [1914] 3 K. B. 356.

Westminster Bank (1) is conclusive in favour of the appellants on this point.

Stuart Bevan K.C. and *Le Quesne K.C.* for the respondents. No doubt Lawson's powers were wide, but they did not authorize him to give directions that the respondents' cheques should be paid into his own private account. Yet this is what he did. In so doing he was asserting an unauthorized dominion and ownership over the respondents' property and so committing a conversion, and the appellants who carried out his unauthorized orders were unlawfully interfering with the respondents' property, and they were committing a conversion: *Stephens* v. *Elwall.* (2) Accordingly the appellants stand unprotected at common law and are forced to rely upon the Indian Negotiable Instruments Act, 1881, and plead that they received payment for their customer in good faith and without negligence. Their good faith need not be challenged; but they were guilty of negligence, which deprives them of this defence: *A. L. Underwood, Ld.* v. *Bank of Liverpool and Martins.* (3) The learned judge has so found. The evidence of negligence is undeniable; it has been stated by the appellants, who do not seek to deny it, but attempt to shelter themselves behind *Morison* v. *London County and Westminster Bank* (1), saying that they were lulled into security by previous transactions of Lawson. But this defence will not avail them, because the learned judge has also found that in fact they had no remembrance of Lawson's earlier dealings.

Then with regard to the cross-appeal. It may be admitted that the plaintiff in an action of conversion cannot recover the full value of the converted property where the whole or part of the property or its value has been recovered, or has come back into his possession gratuitously: *Hiort* v. *London and North Western Ry. Co.* (4); or where the defendant has applied the proceeds of the converted property towards paying the legal debts of the plaintiff: *Bannatyne* v. *MacIver* (5); *B. Liggett (Liverpool)* v. *Barclays Bank.* (6)

(1) [1924] 3 K. B. 356.
(2) (1815) 4 M. & S. 259.
(3) [1924] 1 K. B. 775.
(4) (1879) 4 Ex. D. 188.
(5) [1906] 1 K. B. 103.
(6) [1928] 1 K. B. 48.

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But those cases have no application where, as in the present case, the proceeds of converted property come back to the hands of the plaintiff under a new contract or for a fresh consideration. Therefore the learned judge was wrong in allowing the appellants to set off against the value of the nineteen fraudulent cheques the amount of the cheques subsequently paid into his account with the respondents, but ought to have given judgment for the full amount claimed.

Jowitt K.C. in reply.

[It is not thought necessary to report the arguments of counsel upon a point raised—namely, whether the nineteen fraudulent cheques had ever been issued by the respondents. This turned upon the construction of the Indian Act only, "issue" being defined for English lawyers by the Bills of Exchange Act, 1882. The point is fully dealt with in the judgments of Scrutton and Sankey L.JJ.]

Cur. adv. vult.

May 2. The following written judgments were delivered :—

SCRUTTON L.J. This appeal in a case where one bank sues another for conversion of cheques, drawn by an employee of the plaintiff bank in fraud of his employers on the bank of the plaintiff bank, and collected by the defendant bank, raises a number of difficult questions.

The plaintiff bank, Lloyds Bank, Ld., are the successors of Messrs. Cox & Co., whose business they took over. No point was taken as to the change of parties, and I deal with the case as if Lloyds Bank were interested throughout the whole relevant period. They banked with the Imperial Bank of India, and their cheques had to be signed by two of their officials. One of those officials was one Lawson, their accountant, who had over him in the bank three superior officials, a manager, and two sub-managers. Lawson had an account in the joint names of himself and his wife at the Chartered Bank of India, the defendant bank. From March, 1922, to January, 1924, Lawson carried on a complicated

system of fraud involving some nineteen fraudulent cheques. He signed and by fraud procured the signature by another authorized official of nineteen cheques on the Imperial Bank of India made payable to the defendant bank. He sent them to the defendant bank for collection on his behalf, the instructions to collect in that way being contained in a paying-in slip, or more generally in an accompanying letter, requesting the defendant bank to place the accompanying cheque to the credit of his joint account, and signed by Lawson only. The letter was on the plaintiff bank's letter paper with a printed heading, "From Cox & Co.," the word "From" being sometimes struck out. The defendant bank collected the cheque, which was duly honoured by the Imperial Bank of India, and placed it to Lawson's account. As appears from the account itself, it was generally in small credit till the arrival of each fraudulent cheque, the funds collected from which were promptly drawn out, frequently in favour of stockbrokers. These fraudulent cheques were not discovered for a long time by reason of a complicated series of fraudulent entries, which it is unnecessary to trace in detail, partly also by the neglect by the plaintiff bank of a series of elementary precautions. Lawson was the only person who checked the plaintiff bank's pass book when returned daily, and the auditor only troubled himself with totals and not with items. Within a day or so after the discovery of one of the fraudulent cheques the other eighteen were traced.

Under these circumstances the plaintiff bank sued the defendant bank for conversion of the cheques. Conversion primarily is conversion of chattels, and the relation of bank to customer is that of debtor and creditor. As no specific coins in a bank are the property of any specific customer there might appear to be some difficulty in holding that a bank, which paid part of what it owed its customer to some other person not authorized to receive it, had converted its customer's chattels; but a series of decisions binding on this Court, culminating in *Morison's* case (1) and *Underwood's* case (2), have surmounted the difficulty by treating the

(1) [1914] 3 K. B. 356. (2) [1924] 1 K. B. 775.

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conversion as of the chattel, the piece of paper, the cheque under which the money was collected, and the value of the chattel converted as the money received under it: see the explanation of Phillimore L.J. in *Morison's* case. (1) The plaintiffs' case as to conversion was rested on these authorities, and the trial judge adopted it.

The defendant bank attempted to answer this case in various ways. Their counsel said, as I understood his argument, that each cheque was "issued" on behalf of the plaintiff bank by two agents who had ostensible authority to issue it, to the defendant bank, which was entitled to rely on the ostensible authority. It was perfectly true that one of those agents as between the bank and himself had no authority to issue such a cheque for his own benefit, but to outsiders he was acting within his ostensible authority, and unless they had notice of his fraud, or until the principal, learning of his fraud, avoided the transaction, they were protected in their dealings with the apparently regular cheque. This position was said to be justified by the authorities referred to in the recent judgments in *Reckitt* v. *Barnett & Co.* (2) and in *Lloyd* v. *Grace, Smith & Co.* (3) and *Hambro* v. *Burnand.* (4) In my view it is established that a third party, dealing in good faith with an agent acting within his ostensible authority, is not prejudiced by the fact that as between the principal and his agent the agent is using his authority in such a way that the principal can rightly complain that the agent is using his authority for his own benefit and not for that of his principal. Probably the plaintiff bank could not successfully sue the Imperial Bank of India for honouring these cheques signed by persons who had ostensible authority to sign, because in fact one of them was using his ostensible authority for his own benefit. But it is otherwise where the third party has notice of irregularity putting him on inquiry as to whether the ostensible authority is being exceeded. Now in the present case a subordinate official of a bank is steadily paying cheques of a bank by which he is employed, made payable to the

(1) [1914] 3 K. B. 378.
(2) [1928] 2 K. B. 244.
(3) [1912] A. C. 716.
(4) [1904] 2 K. B. 10.

collecting bank, into his own acount at that collecting bank. They are not cheques which on their face have any relation to Lawson, except that he is one of the officers signing; and their amounts are such that they cannot be payments of salary. The only authority to use for Lawson's benefit cheques which on their face have no connection with Lawson, is a signature by Lawson himself. It appears to me that as in *Underwood's* case (1) these facts put the defendant bank on inquiry. It is very important, in my view, to maintain safeguards against employees dealing with their masters' property without authority. If the cheque had come forward without the accompanying authority of Lawson I do not think the defendant bank would have committed conversion by collecting the proceeds and asking for further instructions. The learned judge below has taken the view that the cheque was never issued, and therefore the payee had no rights. Under the English Bills of Exchange Act "issue" is defined: "The first delivery of a bill or note, complete in form to a person who takes it as a holder," and "Holder" means "The payee or indorsee of a bill or note who is in possession of it, or the bearer thereof." But the House of Lords has decided in *R. E. Jones, Ld.* v. *Waring & Gillow* (2) that the original payee of a cheque is not a holder in due course. The Indian Negotiable Instruments Act, however, to which the judge was not referred on this point, includes (see s. 9) in the definition of "holder in due course" the payee of a cheque. It does not define "issue," but does, in s. 14, define "negotiation," so as to make the payee under a cheque transferred to him a holder by negotiation. It seems to me that each cheque taken by itself was "issued," being signed and dealt with by persons having ostensible authority to sign and issue it, but the accompanying memorandum signed by Lawson alone and its directions gave notice of irregularity, which destroyed the holding in due course. I prefer this view to that of the learned judge that there was no "issue." It seems to me that the position is rather that of an issue with notice of irregularity, than an issue under a voidable title, good till avoided. In *Corporation*

(1) [1924] 1 K. B. 775. (2) [1926] A. C. 670.

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Agencies v. *Home Bank of Canada* (1) the cheques drawn in fraud were treated by the Privy Council as drawn within an ostensible authority, and the distinction between that case and *John* v. *Dodwell & Co.* (2) was made to turn on no notice or notice. (3) I think in this case there was notice, as in *Underwood's* case. (4) There being conversion, not waived but relied upon, the plaintiffs could not sue for money had and received, and they so stated to us and to the defendants by letter, after judgment was reserved. The fact of the notice also prevents the defendants from treating themselves as holders in due course of the second cheque, which they credited to their customer's account before collection. This fact also prevents the defendants from claiming the protection of the Indian Act, s. 131, in respect of this cheque, as they did not collect it for a customer, having already credited him with the amount.

The defendants next relied on s. 131 of the Indian Negotiable Instruments Act, which takes the place of s. 82 of the English Act and gives protection to a banker who, in good faith, and without negligence, collects for a customer a crossed cheque. The Indian Act uses the language "In case the title to the cheque proves defective," which is the language of the English Act of 1876 (39 & 40 Vict. c. 12). The English Act of 1882 expands this to "The customer has no title or a defective title." It was argued that the Indian Act only applied to cases of an ostensible but defeasible title, and not to cases of no title. I do not know why the language was altered. I notice that in *Matthiessen* v. *London and County Bank* (5) Lindley J. uses the language "Has a bad title." But, as it seems to me in the present case that the bank had a title as holder under the Indian Act, defective through notice, I do not think the difference, if any, in the Acts is material. It was also said that the Act could not protect the bank, as they were the true owners, being payees, and could not owe a duty to themselves. As they were payees with notice of

(1) [1927] A. C. 318.
(2) [1918] A. C. 563.
(3) [1927] A. C. 323, 324.
(4) [1924] 1 K. B. 775.
(5) (1879) 5 C. P. D. 7.

irregularity in the accompanying memorandum, I do not think they were "true owners."

There remains the question which gave the learned judge a great deal of trouble, whether the defendant bank showed that they collected without negligence. Negligence involves duty; and as the collecting bank, apart from statute, owed no duty to the owner of the cheque, the duty must be one created by the statute itself. I accept the measure of duty stated by Lord Dunedin in *Commissioners of Taxation* v. *English, Scottish and Australian Bank* (1), where he says: "Mr. Justice Isaacs says, 'Apart from the well-established rule that whether or not the evidence establishes that a person acts without negligence is a question of fact, the legal principles found in *Morison* v. *London County and Westminster Bank* (2) and relevant to the present, are (1.) that the question should in strictness be determined separately with regard to each cheque; (2.) that the test of negligence is whether the transaction of paying in any given cheque was so out of the ordinary course that it ought to have aroused doubts in the bankers' mind, and caused them to make inquiry.' If there be inserted after the words 'given cheque' the words 'coupled with the circumstances antecedent and present,' their Lordships think this is an accurate statement of the law." Lord Dunedin adds to it the qualification, which I entirely accept, that to require a thorough inquiry into the history of each cheque would render banking business impracticable, and that therefore there must be something markedly irregular in the transaction. The learned judge finds, after careful consideration, that the defendant bank failed to prove absence of negligence. He rests his judgment on the payment by Lawson of large cheques of his bank into his private account and failure to make inquiries of the manager of the plaintiff bank as to the regularity of the transactions. I agree in this finding, and would add that I think examination of Lawson's account (and I am sure that general examination of the account of every customer takes place from time to time in all well-managed banks) should have put the defendant

(1) [1920] A. C. 683, 688. (2) [1914] 3 K. B. 356.

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bank on inquiry as to the source from which these heavy payments to stockbrokers were being made, in an account generally in low water except for these payments in, immediately reduced by payments out.

The only remaining defence was that the defendant bank was "lulled to sleep" by the failure of the plaintiff bank to detect these frauds. The learned judge has dismissed this on the ground that no one from the defendant bank came to say he was "lulled to sleep"; their attitude was that they remembered nothing about the matter. This is enough to dispose of the point; but, though a similar defence succeeded in *Morison's* case (1), I am not at all satisfied as to the grounds of such a decision. It does not seem consistent with the decisions in *Bank of Ireland* v. *Evans Trustees* (2) and *Swan* v. *North British Australasian Co.* (3) that in order to act as an estoppel negligence must be the proximate cause of the loss. If my butler for a year has been selling my vintage wines cheap to a small wine merchant, I do not understand how my negligence in not periodically checking my wine book will be an answer to my action against the wine merchant for conversion. However, the ground of the learned judge's decision is enough to dispose of this point. This, I think, substantially exhausts the points taken on the appeal, which must be dismissed with costs.

The plaintiffs had a cross-appeal which originally raised four matters. Of these a claim in respect to salvage from Lawson's property has been arranged; a claim for interest on the amount recovered was abandoned; a claim to treat the sum as awarded on a claim for money had and received (in which case considerations of exchange would make the amount larger) was abandoned, if the plaintiffs succeeded on conversion, by letter after the hearing before us, on the ground that if the plaintiffs did not waive the tort, but succeeded on conversion, they could not claim in assumpsit. There remains a contention that the judge was wrong in allowing the defendants to reduce the sum awarded against them

(1) [1914] 3 K. B. 356. (2) 5 H. L. C. 389.
(3) (1863) 2 H. & C. 175.

by the items set out in para. 10 (*a*) of the amended defence, being sums which Lawson was said to have paid back to the plaintiffs out of the amount converted by him, so that the plaintiffs had not in fact suffered the damage alleged. It seems to me clear that damages in conversion may be reduced by the return of the chattel converted; and that where there has been a series of conversions of the same chattel, the return of the chattel by one of the wrongdoers may be used to reduce the damage against each wrongdoer. But when you come to the conversion of a cheque, it is not at all clear how the fact that one of the persons converting has after conversion paid to the plaintiff, not the cheque converted, but some currency, not necessarily the currency derived from the cheque converted, can be treated without more as a reduction of the damages for the original conversion. The servant of a tradesman converts a cheque of his employer through a bank, and at a later period comes into his employer's shop and buys for 10*l.* a chattel sold by the employer. Can the bank claim to reduce the damages for conversion by 10*l.* because the employer has received 10*l.* from the original wrongdoer? Will proof that the 10*l.* came out of the proceeds of the cheque converted make any difference? There are authorities, beginning with the *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (1), the latest application of which is by Wright J. in *B. Liggett* (*Liverpool*) v. *Barclays Bank* (2), which support the view that if the person converting without authority can show that he used the proceeds in discharging debts of the plaintiff, that fact may reduce to that extent the sum claimed from the wrongdoer. But whether any particular payment to the plaintiff by one of the wrongdoers reduces the damages for conversion must depend on the facts of each case, and cannot be settled by mere proof of receipt without more. In *Underwood's* case (3) the Court of Appeal therefore ordered an inquiry as to the circumstances of each payment; the parties, however, settled the matter. Wright J. has ordered a similar inquiry in *B. Liggett's* case. (2) I take as a sample in

(1) (1882) 22 Ch. D. 61. (2) [1928] 1 K. B. 48.
(3) [1924] 1 K. B. 775.

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the present case, the first five payments alleged in para 10 (*a*) of the defence, which are closely connected with the first fraudulent cheque in this case. This cheque was one for Rs.15,000, dated March 31. Against it five cheques were drawn which all, in various ways, came to the plaintiffs. They amounted to Rs.15,617, and changed Lawson's account with the defendants from a credit of Rs.232 to a debit of Rs.385. Obviously therefore to allow the defendants to deduct Rs.15,617, as has been done, is to give them the advantage to the extent of Rs.617 of payments which were not derived from the first cheque converted. It seems also to assume that any chance which the owner of the property converted had of appropriating property of the wrongdoer to meet his claim, though the owner did not know of the conversion, may be used to reduce the damages payable by any wrongdoer. Next these five cheques, which the defendants claim to be allowed to deduct from the damages, were as follows: (1.) A cheque for Rs.2250 paid by Lawson into his account at the plaintiffs' bank, turning his account, which was then Rs.2075 in debit, into Rs.175 in credit. I do not see how Lawson could claim this as reducing his damages, as he promptly proceeded to draw against it till his account was again Rs.900 overdrawn. If he could not so use it, I do not see how the defendants could so use it, unless they showed some duty to them on the part of the plaintiff bank to discover Lawson's frauds, and I do not see any justification for inferring such a duty. (2.) Two cheques for Rs.7917 and Rs.4750 respectively paid by Lawson to the plaintiff bank, to purchase two telegraphic transfers to London. Lawson was buying these apparently to meet two drafts on London which he had obtained from Cox & Co., for Rs.7649 on February 20 and Rs.4663 on March 13. Our attention was not called to the details of these transactions, but it looks as if the plaintiff bank gave value for these cheques, and if so, to allow the defendant bank to take credit for the whole sum would be to inflict a double penalty on the plaintiff bank. Lastly, there were two cheques for Rs.350 paid to the plaintiff bank not into Lawson's account. Our attention was not called

to any explanation of these amounts, and I do not see any justification for the defendant bank, without more, claiming to debit the plaintiff bank with them. No evidence was given that any of the sums in para. 10 (*a*) went to pay debts of the plaintiff bank, which might bring the matter within such authorities as *Bannatyne* v. *MacIver* (1) and *Reid* v. *Rigby & Co.* (2) In my opinion the mere proof of receipt of moneys from the wrongdoer, which, if the owner of the property converted had known of the conversion, he might have appropriated against his loss by conversion, does not, in the absence of knowledge of the conversion, justify the deduction claimed.

The cross-appeal, therefore, succeeds on this point, and the judgment for the plaintiffs should be increased to 17,044*l.* 15*s.* 2*d.*

The appeal must be dismissed with costs and the plaintiffs must have the costs of the cross-appeal.

SANKEY L.J. In February of 1923 the plaintiffs took over the business carried on by Messrs. Cox & Co. as bankers in England, India, and elsewhere, and in the remainder of this judgment I propose to refer to Messrs. Cox & Co. and Lloyds Bank, Ld., as the plaintiffs.

The plaintiffs alleged that on various dates between March 30, 1922, and January 21, 1924, one Lawson, the chief accountant of their Bombay branch, with another official, drew cheques to the number of nineteen on the Imperial Bank of India, with whom the plaintiffs had an account. The said Lawson drew the cheques in favour of the defendants, and delivered them to the defendants, the first cheque with a paying-in slip, and each of the others with a memorandum containing instructions by Lawson to the defendants to put the said cheques or the proceeds thereof to the credit of Lawson's joint account in the Bombay branch of the defendants. They further alleged, as indeed was the fact, that Lawson acted in fraud and without the authority of the plaintiffs, and that the defendants wrongfully converted the said cheques by collecting the same from the Imperial Bank of India and

(1) [1906] 1 K. B. 103. (2) [1894] 2 Q. B. 40.

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putting the proceeds to the credit of the said joint account, whereby they, the plaintiffs, suffered damage. The plaintiffs claimed a sum of 17,044*l.* 15*s.* 2*d.* and alternatively a rather larger sum on a count for money had and received.

The defendants contended: (1.) That they were not guilty of conversion; (2.) That they are protected by s. 131 of the Indian Negotiable Instruments Act, 1881 (as modified up to September 1, 1909), which reads as follows: "A banker who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to himself shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment." They further contended that they acted in good faith, which is not disputed, and without negligence in the circumstances, and upon that issue is joined. The learned judge accepted the plaintiffs' contention, but said that they were liable to give credit in respect of certain amounts, being part of the proceeds of the above mentioned cheques which had found their way back into Lawson's account with the plaintiffs, and in the result he gave judgment for 12,470*l.* From that judgment the defendants appeal, and the plaintiffs appeal in respect of the credits allowed.

The plaintiffs had in their employment at all material times the said Lawson, who had for ten years been in the position of chief accountant. He had, besides his duties of looking after the accounts, full powers under a power of attorney to sign cheques, and to commit the plaintiffs by his signature. (Clauses 2, 3, 6, 7, 10 and 12.) His salary was at the rate of Rs.1200 a month, which sum was credited to him in a current account which he had with the plaintiffs' bank. He had also a banking account with the plaintiffs in London, and, thirdly, he had a current account with the defendant bank, originally in his own name, but later on as a joint account in the name of himself and his wife. The plaintiffs had an account with the Imperial Bank of India. Lawson was a rogue who has since been convicted and sentenced to a long term of imprisonment, and the above mentioned

nineteen cheques were fraudulently obtained and used by him, the first fraud being in respect of a cheque of March 31, 1922, and the last fraud in respect of a cheque of January 22, 1924. Before he began the frauds he had a considerable number of honest dealings, by means of which money was transferred from the plaintiff bank to his own account at the defendants' by means of pay slips. These sums ranged from the small amount of Rs.687 to the large one of Rs.7649. It is necessary to mention this fact, because one of the considerations urged by the defendants is that, before the fraudulent transactions, Lawson had with them considerable transactions which were admittedly honest.

The nineteen cheques drawn upon the Imperial Bank of India, which are the subject of this action, required to be signed by two signatories in order to make them valid cheques drawn by the plaintiffs. Lawson was entitled to sign a cheque, and any one of various other persons was entitled to be one of the two joint signatories required. These cheques are in the form: "Pay the Chartered Bank of India, Australia & China"—that is the defendants—"or order," and they are crossed. They are drawn upon the plaintiffs' account with the Imperial Bank of India. Every one is signed by Lawson and also signed by some second signatory. The fact is that they were fraudulently prepared by Lawson, who fraudulently got the other officials to sign them because he intended to use them, not for the proper purposes of the plaintiffs' business, but for his own fraudulent purposes and for his own improper enrichment. Every one of these cheques was in fact paid in by Lawson to his joint account with the defendants; it was collected by the defendants from the Imperial Bank of India, and was credited by them to Lawson's joint account. The first cheque was apparently handed in over the counter; but all the remainder were sent by Lawson with a covering letter, addressed to the defendants, the effect of which was as follows: "Dear Sirs, Please place the amount of the enclosed cheque for 11,000 rupees to the credit of my joint account and oblige, Yours truly, T. D. Lawson." These personal letters from Lawson to the defendants were in each

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case written upon the office paper of the plaintiffs. No particular ingenuity appears to have been exercised in the perpetration of the fraud. When Lawson was in need of money, presumably to meet his losses in speculation, he issued a cheque duly signed on behalf of the plaintiffs, drawn on the Imperial Bank of India, but he passed no entries until the last day of the month, when to reconcile the Imperial Bank account he debited the plaintiffs' Bombay account with their Calcutta Agency in the books at Bombay on account of a payment to a local firm. A cheque on the Imperial Bank was made out in favour of the firm for the said payment, but the cheque was subsequently destroyed. It was Lawson's duty as accountant to check the books each day and to reconcile the Imperial Bank account, and to send to the head office a reconciliation at the end of each month. The day following the above entries they were reversed until the end of the month, when the operation was completed. There was no examination of vouchers by a senior officer, but each member of the staff went through the vouchers daily to verify his own signature. It was not the custom to exchange continuations of both inward and outward accounts with the Calcutta branch, or the fraud might have been discovered sooner. The plaintiff bank were undoubtedly negligent. Mr. Buckler, their district manager, who investigated the fraud, writes on March 27, 1924: "I cannot think that, had Bombay had an adequate staff of trained men, Lawson would have been able to defraud the bank over a period of 23 months without detection." The same officer says in his report on April 2: "The methods employed by Lawson disclosed very grave defects in the system at the Bombay office, or, to put it bluntly, an entire lack of system and a complete reliance on one man who was allowed not only to make out vouchers, draw cheques, and obtain a second signature to the cheques without the slightest query, but also to check up and reconcile the accounts on which he was operating. The position of an accountant in a big office must carry a considerable amount of weight, particularly with the junior staff, but it is almost incredible that so many members of the staff should have

gone on so long without querying a system by which they signed cheques blindly, or raising some protest on their own responsibility in doing so. To all intents and purposes Bombay has been a one signature branch, for the second signature is added merely on the strength of the first, and in order to conform to the rule of two signatures." A considerable body of evidence was given by officials both of the plaintiff and of the defendant banks to explain the system by which the frauds were made, and the transactions were carried out, but only one expert banker was called, namely Mr. Allen, who had a large experience of Indian banking, and he was called for the plaintiffs.

I come now to the points raised. The questions which arise are: (1.) Were the defendants guilty of conversion of the cheques in question; (2.) Are they protected by the Indian Act above referred to, by reason that they have in good faith and without negligence received payment for a customer of the cheques in question? Several points emerge for decision here which are applicable to both questions. As to (1.), Were the defendants guilty of conversion, the defendants put their argument as follcws: (1.) There was no conversion, because we had a voidable title to the cheques in question which had not been avoided before we dealt with them by collecting the money, and placing it to Lawson's account. (2.) They say, this also applies to the case made against us under the count for money had and received. The plaintiffs informed the Court that if they were successful in their case for conversion they did not desire to rely on the count for money had and received. The defendants refer to the case of *Tate* v. *Wilts and Dorset Bank* (1), which they say is conclusive in their favour, and urge that in the circumstances they have no need to rely upon their statutory defence. Their reasoning is that this is a case where a negotiable instrument was issued by the plaintiffs who were induced, it is true, to issue it by the fraud of Lawson; but still they did issue a negotiable instrument, and it carried with it all the rights of third parties to deal with it, and the

(1) See note (6) ante, p. 50.

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plaintiffs cannot claim to impair those third parties' rights by reason of the fact that they were induced to do what they did by the fraud of their servant. Even if *Tate's* case (1) can be held to be good law since the decision in *Morison* v. *London County and Westminster Bank* (2), the facts there were entirely different, and it is not applicable to the present circumstances. The cheque there was issued, and was meant to be issued, by Tate himself, and was made payable to the order of Dixon, who had a voidable title. The Court held that the banker who has collected an uncrossed cheque for a customer is protected where that customer holds under a voidable title. The learned judge decided against this point upon the ground that the plaintiffs did not issue the document, but that the document was issued by Lawson, a fraudulent servant, as part of his fraud. There is some ground for taking this view to be found in *Morison* v. *London County and Westminster Bank*. (2) The fraudulent person there was a man of the name of Abbott, who issued the cheques purporting to do so under an authority conferred on him by the plaintiff Morison. Lord Reading C.J. said (3): "The cheques were at all times, until issued" [i.e. by Abbott] "the property of the plaintiff. They were never the property of Abbott, who had no title to them." Buckley L.J. said (4) that the plaintiff was the true owner of the cheques in question; and Phillimore L.J. said (5) the cheques were the plaintiff's instruments until he chose, or until Abbott on his behalf chose, to issue them to some outside person. There is, however, this distinction to be drawn between the present case and *Morison's* case. (2) In *Morison's* case (2) Abbott had no authority to draw the cheques, and so the defendant's title to such cheques was defective, as Abbott issued them to the defendants in fraud of the plaintiff. In the present case Lawson had actual authority to draw cheques. I should prefer to state the point as to whether the defendants were guilty of conversion in the following way. It must be admitted that, upon a proper construction of the power of

(1) See note (6) ante, p. 50.
(2) [1914] 3 K. B. 356.
(3) [1914] 3 K. B. 364.
(4) [1914] 3 K. B. 375.
(5) [1914] 3 K. B. 378.

attorney, Lawson had actual authority to be one of the signatories of the cheques in question, as indeed in each case the other signatory had. Mr. Curling, the manager of the plaintiffs' Bombay branch, admitted that Lawson had this authority jointly with another person. But he had no authority to send the cheque with the private memorandum above referred to requesting the defendants to put it in his joint account, and in doing so he was guilty of conversion and so were the defendants who carried out his instructions. As Lord Ellenborough C.J. said in *M'Combie* v. *Davies* (1): "A man is guilty of a conversion who takes my property by assignment from another who has no authority to dispose of it; for what is that but assisting that other in carrying his wrongful act into effect." Both upon this ground and upon the ground taken by the learned judge in the Court below, I am clearly of opinion that the defendants were guilty of conversion of the plaintiffs' cheques. Indeed, *Morison's* case (2) is a direct authority for this proposition.

As to point (2.), which is probably the most important one, Are the defendants protected by the section of the Indian Act above referred to? That depends upon whether they were guilty of negligence in these transactions. Both this section and the corresponding s. 82 of the Bills of Exchange Act have given great trouble to the Court. What is negligence, under the circumstances? The difficulty is that the statute does not speak of any corresponding duty, but leaves that to be inferred. I think the duty of the defendants to the true owner of the cheque was (1.) to exercise the same care and forethought with regard to the cheque paid in by the customer as a reasonable man would bring to bear on similar business of his own (see Sir John Paget on Banking, 4th ed., p. 274), and (2.) to provide a reasonable and competent staff to carry out this duty.

There are numerous tests which have been applied in the Courts from time to time suggesting what may or may not be negligence. For example, a bank may be negligent in not making inquiries as to a customer on opening an account:

(1) (1805) 6 East, 538, 540. (2) [1914] 3 K. B. 356.

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Ladbroke & Co. v. *Todd* (1); *Commissioners of Taxation* v. *English, Scottish and Australian Bank* (2); and there may be negligence in not noticing the account of the customer from time to time and considering whether it is a proper or a suspicious one: *Morison's* case. (3) In this case the plaintiffs formulate their charges of negligence in the following way. They say: (1.) Lawson, an employee of the plaintiffs, was transferring large sums of money from the plaintiffs' bank to the defendants' bank. Why? If he had an account at the plaintiffs' bank only, the money would be accessible there. (2.) Heavy payments were made directly afterwards to persons some of whom the defendants knew to be stockbrokers. (3.) The method by which the transfers were made was an uncommon one; they were not made by a cheque drawn by Lawson on his own account with the plaintiffs, but by cheques purporting to be drawn by the plaintiffs on the Imperial Bank in favour of the defendants. (4.) Each cheque was accompanied by a memorandum signed by Lawson in person instructing the defendants to put the cheque in question to the credit of his joint account. (5.) One signatory to the cheque was always Lawson himself, and the cheque was, as stated above, accompanied by the personal memorandum from Lawson himself on the plaintiffs' printed form, but was not signed by two, as the cheque was. The defendants seek to avoid this by referring to the pay slips above mentioned, which were admittedly honest transactions; to which the plaintiffs reply: True they were honest transactions, but the pay slips are equivalent to cheques drawn by Lawson on his own account from the plaintiffs. They are quite different from the fraudulent cheques, which have nothing to do with Lawson's own account. It would be difficult for a lawyer to come to a conclusion merely upon the argument of counsel, but here in this case there is evidence upon which the Court can act. For example, Mr. Curling, the plaintiffs' manager at Bombay, at p. 23 of Document 8 said: "I feel that the Chartered Bank should have queried receiving cheques in

(1) 19 Com. Cas. 256. (2) [1920] A. C. 683.
(3) [1914] 3 K. B. 356.

their own favour, and not in favour of Lawson when drawn by Cox & Co. or Lloyds Bank on their account at the Imperial Bank; I also feel that their attention should have been more closely drawn to that owing to the fact that one of the signatories on every cheque was Lawson; I feel, further, that the Chartered Bank must have known that Lawson was an employee of Cox & Co. and Lloyds Bank in turn owing to the fact that the memoranda which Lawson sent covering the cheques for his credit were all on paper bearing the title of Cox & Co. or Lloyds Bank"; and Mr. Lane, the deputy manager of the Bombay branch, said in the same document, at p. 121, as follows: "I consider that the defendants were negligent not once but many times in accepting instructions from a private individual regarding the disposal of a cheque made payable to themselves (and) which was not signed by the individual giving instructions." And at p. 129 he further says: "I have said in my evidence that if I was giving a confidential opinion I should see that the account was never overdrawn and describe the account as a satisfactory account, and seeing that there were considerable sums of money passing through, I would describe it as 'means fair,' but if I had any reason for suspicion I should have examined the items in the account and if I did that I should find that constant differences were being paid to share brokers in Bombay, which would give any bank man the feeling that this man was speculating." Mr. Lenney, of the defendants, at question 655 of Document 9, excused the bank by referring to the above mentioned honest transactions, but the independent witness already referred to, Mr. Allen, said, on p. 81 of Document 6A, in answer to the question, "Ought it to have gone through? (A.) Oh no. If I like to put a young man in a position where he should exercise discretion and he is not capable of doing it I cannot shield behind him, I am afraid. (Q.) If that young man with such knowledge of his business as he should have had had stopped and looked at the cheque, and looked at the paying-in slip, and examined both documents, ought he to have let it go through? (A.) Oh no. He should have queried it to his

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manager." With reference to the last answer of Mr. Allen, the admission is made in the correspondence by Mr. Buckler on March 27, where he says: "I cannot think that, had Bombay had an adequate staff of trained men, Lawson would have been able to defraud the bank over a period of 23 months without detection." Bailhache J. in *Ross* v. *London County Westminster and Parr's Bank* (1) says: "I must attribute to the cashiers and clerks of the defendants the degree of intelligence and care ordinarily required of persons in their position to fit them for the discharge of their duties. It is therefore necessary to consider whether a bank cashier of ordinary intelligence and care on having these cheques presented to him by a private customer of the bank would be informed by the terms of the cheques themselves that it was open to doubt whether the customer had a good title to them." Lord Dunedin says, in *Commissioners of Taxation* v. *English, Scottish and Australian Bank* (2), to which I have already referred, approving the words of Isaacs J. in the High Court of Australia: "Apart from the well established rule that whether or not the evidence establishes that a person acts without negligence is a question of fact, the egal principles found in *Morison* v. *London County and Westminster Bank* (3) and relevant to the present, are: (1.) that the question should in strictness be determined separately with regard to each cheque; (2.) that the test of negligence is whether the transaction of paying in any given cheque was so out of the ordinary course that it ought to have aroused doubts in the bankers' mind, and caused them to make inquiry. If there be inserted after the words 'given cheque' the words 'coupled with the circumstances antecedent and present' their Lordships think this is an accurate statement of the law."

The items of negligence to which I am disposed to attach the greatest importance are: (1.) The fact that the defendants knew that Lawson was an employee of the plaintiffs and was transferring these large sums of money from the plaintiffs'

(1) [1919] 1 K. B. 678, 685. (2) [1920] A. C. 683, 688.
(3) [1914] 3 K. B. 356.

bank to the defendants' bank, and (2.) The methods by which the transfers were made. In my view, a bank cannot be held to be liable for negligence merely because they have not subjected an account to a microscopic examination. It is not to be expected that the officials of banks should also be amateur detectives. It is not easy, nor is it desirable, to define the degree of negligence which would render them liable. Many factors have to be taken into consideration, the customer, the account, and the surrounding circumstances. But, while it is difficult to draw the line, the problem upon which side of the line a particular case falls does not present such difficulties. Having regard to the uncommon nature of the cheques in question, having regard to the fact that Lawson was an employee of the plaintiffs, as was well known by the defendants, and having regard to the heavy payments made at crucial times to persons known to be brokers, I cannot come to any other conclusion than that the defendants were negligent in this case. In the case of *Bissell & Co.* v. *Fox Brothers & Co.* (1) Denman J. said, in reference to s. 82 of the Bills of Exchange Act, 1882, which is similar to the words in the Indian Act: "It is clear, I think, that the negligence contemplated in s. 82 must mean the neglect of such reasonable precautions as ought to be taken with reference to the interests, not of the customer who purports to have the authority, but of the principal whose authority he purports to have, the section being framed wholly with reference to the liability of the banker to the 'true owner' of the cheque and not with reference to his liability to his customer." That statement was approved on appeal (2) and is, I think, followed by Kennedy J. in *Hannan's Lake View Central* v. *Armstrong & Co.* (3), although in *Ladbroke & Co.* v. *Todd* (4) Bailhache J. puts it rather differently. Who then is the true owner of the cheque to whom the bank owes the duty? The defendants' contention was that they were the true owners and the duty in such circumstances was one which they owed to themselves only, and therefore they could not

(1) 51 L. T. 663, 666.
(2) 53 L. T. 193.
(3) 5 Com. Cas. 188, 191.
(4) 19 Com. Cas. 256, 261.

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be guilty of negligence towards the plaintiffs. In my view, this is wholly inapplicable. The plaintiffs were the true owners of the cheques in question: see the judgment of Buckley L.J. in *Morison's* case (1) already referred to.

It is not necessary, in my view, to discuss all the points raised, having regard to the conclusion I have come to on the main points. It is only necessary to refer to the second cheque of July 10, 1922, which was credited to Lawson before it was cleared. In my view the defendants have no defence to that, as they did not receive payment for the customer within the meaning of s. 131 of the Indian Act, and they were not collecting it for their customer. I think under the Indian Act the original payee of a cheque can be a holder in due course, the Indian Act differing from the English Act in this respect, under which the Lord Chancellor in *Jones* v. *Waring & Gillow* (2) held that the original payee of a cheque was not a holder in due course, and I do not think the principles laid down by the majority of the Court in *Reckitt's* case (3) assist the defendants. There was ample material which should have aroused the defendants' suspicions and put them on inquiry with regard to this cheque.

The defendants contended that even if they were negligent, they were entitled to say that after a time they were "lulled to sleep," as it is put by Buckley L.J. in *Morison's* case (4) by the plaintiffs' failure to take proper precautions, and therefore they ought not to be held liable in this case, where the plaintiffs were themselves so negligent. This doctrine of lulling to sleep, as it was called during the course of the argument, must depend either upon estoppel or ratification and, having regard to the facts of the present case, I do not think that the doctrine is applicable or that it can be said that anything the plaintiffs did ratified the defendants' actions or created an estoppel preventing them, the plaintiffs, from succeeding in this action. Giving the best consideration I can to this matter, I have reached the conclusion that the charges of negligence set up by the plaintiffs have been made

(1) [1914] 3 K. B. 356.
(2) [1926] A. C. 670, 680.
(3) [1928] 2 K. B. 244.
(4) [1914] 3 K. B. 356, 377.

out and the defendants cannot rely on the Indian Act as a defence. In the result, I think the appeal of the defendants must be dismissed.

There remains to be considered the cross-appeal of the plaintiffs. The facts here may be stated shortly. It is said that some of the proceeds of the fraudulent cheques found their way back into Lawson's account at the plaintiffs' bank, and that therefore credit must be given in this action for the amount of those cheques. The number of the cheques is twenty-four, amounting to 4574*l.* 0*s.* 10*d.*, and the particulars will be found in para. 10A of the defence. It is clear on the authorities that the damages for conversion of a cheque are the face value of it. The law has always regarded very jealously the conversion of a man's property by another: *Edmondson* v. *Nuttall.* (1) But where the defendant in an action for conversion is able to prove that the plaintiff has got back part of the proceeds of the property wrongfully converted, he is pro tanto excused: see *Hiort* v. *London and North Western Ry. Co.* (2) *Bannatyne* v. *MacIver* (3), where the defendant was entitled to take credit for the sums which he had used for paying the legal debts of the plaintiffs, and *Reversion Fund & Insurance Co.* v. *Maison Cosway* (4), where *Bannatyne* v. *MacIver* (3) was commented upon, are distinguishable. The defendants have not satisfied me that the plaintiffs did get back any of the proceeds of the cheques. Part of the proceeds were paid for or into Lawson's account when it was in debit and therefore went to pay the debt of Lawson. Part of them went into Lawson's account when it was in credit and was used by him for his own purposes. It is impossible to say that any part of the proceeds of the fraudulent cheques was received by the plaintiffs.

In my view, therefore, credit cannot be given for them, and the cross-appeal should be allowed with costs.

TOMLIN J. Upon the facts of this case I think that, though each of the fraudulent cheques was on its face signed in

(1) (1864) 17 C. B. (N. S.) 280.
(2) 4 Ex. D. 188.
(3) [1906] 1 K. B. 103.
(4) [1913] 1 K. B. 364.

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accordance with the apparent authority, no one of them passed from Lloyds Bank (in which expression I include Cox's Bank and their successors in title) into the possession of the Chartered Bank under any authority from Lloyds Bank either actual or apparent. Each cheque was signed by Lawson in furtherance of his fraudulent purpose, and by the other signatory for some other purpose in respect of which he was deceived by Lawson. Having been signed the cheque was never passed officially out of the custody of Lloyds Bank to the Chartered Bank—Lawson acting in his private capacity was the sole channel of communication between the two banks—and the only instruction to the Chartered Bank was, in one case a paying-in slip, and in the other cases a written memorandum, signed by Lawson in his personal capacity and purporting to direct that the proceeds of the relative cheque should be placed to the credit of the joint account of Lawson and his wife with the Chartered Bank.

Now it is not admissible, in my opinion, in these circumstances to separate the signing of the cheque from the acts whereby the cheque and the instructions for dealing with it passed into the hands of the Chartered Bank. The transaction must, I think, in each case be regarded as a whole for the purpose of determining where the property in the cheque lay, and, upon the facts which I have mentioned, it remained in my judgment with Lloyds Bank. If this be the true view, I think that the Chartered Bank are liable for conversion in respect of the nineteen cheques unless they can escape by bringing themselves within the protection of s. 131 of the Indian statute, the Negotiable Instruments Act, 1881, and I may add here, in regard to the second cheque, that I agree with the learned judge below that the Chartered Bank are in no better position, because they advanced money to Lawson against this cheque before it was cleared.

Now I cannot doubt that the protection which s. 131 affords to a banker, by necessary implication imposes upon the banker, as a condition of the benefit conferred, a duty of care towards some one or more of the persons who may be

affected by his action. It may be difficult to define, in general terms applicable to every case, the person to whom the duty is owed or the ambit of the duty itself, but, if the section applies here, I think there was upon the Chartered Bank a prima facie duty towards Lloyds Bank, as the apparent drawers of the cheque, and that the Chartered Bank might have expressed to themselves that duty in some such terms as these: "Here is a cheque of Lloyds Bank drawn on their account at the Imperial Bank to our order although we have no claim against Lloyds Bank requiring to be satisfied out of it. It has come to our hands, not from Lloyds Bank acting through any of its authorized officials, but from a person who, though an official of the bank, is acting in his personal capacity only, and who, though one of the signatories of the cheque, is claiming the money for his own benefit. In this state of affairs we must treat the cheque as still belonging to Lloyds Bank until an official direction is obtained."

The first question is, does the section apply at all? It is said it does not, because (1.) Lawson had no title to the cheque, and (2.) because the Chartered Bank being the payees did not collect the cheque for a customer. Upon the construction of the section I do not think that its operation is confined to cases where there is some title though a defective one, but extends to cases where there is no title at all. Further, having regard to the decision in *Morison* v. *London County and Westminster Bank* (1), where one of the cheques was drawn to the order of the collecting bank, I do not think that it would be possible to hold that in the present case the Chartered Bank did not collect for a customer. To do so would be to put upon the Indian section, which is substantially identical with s. 82 of the English Act, a meaning different from that attributed to the latter section by this Court.

The section therefore, in my opinion, applies, and the next question is whether the Chartered Bank have established that they acted in good faith and, having regard to the duty

(1) [1914] 3 K. B. 356.

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resting on them, without negligence. In view of what the bank actually did, I do not think that they can establish that they acted without negligence, though admittedly acting in good faith, unless they can justify their conduct either (1.) by reference to some recognized banking practice, or (2.) by reason of some special circumstances in the case. The learned judge below has not found, nor do I think the evidence established, the existence of any special banking practice to justify the course taken by the Chartered Bank.

The Chartered Bank, however, rely upon certain special circumstances which, they say, relieve them of the charge of negligence. The point may be put shortly in this way: Before the first fraudulent cheque was presented, that is, before March 31, 1922, Lloyds Bank had been from time to time paying considerable sums of money to Lawson by means of pay slips signed by Lawson on behalf of Lloyds Bank. These pay slips Lawson passed to the Chartered Bank for collection for the credit of his joint account, and in two instances the pay slips had been drawn in favour of the Chartered Bank and had come to the Chartered Bank from Lawson in his personal capacity with a private memorandum of Lawson instructing the Chartered Bank to credit the proceeds to the joint account. These were all legitimate payments, and it is said that, having regard to them, any suspicion which the first fraudulent cheque ought otherwise to have aroused might reasonably have been allayed, and that there was still less ground for suspicion in the case of the second fraudulent cheque which was received some four months after the first, with a pay slip transaction intervening between them, and that when it was found that no question arose on the pay slip transactions, or on the first two cheques, a fortiori there was no reason to treat as suspicious the subsequent cheques. I do not think that this contention can be supported. The pay slip transactions differed in at least two material respects from the cheque transactions. They were for substantially smaller amounts, and the money receivable in respect of them was payable directly by Lloyds Bank. When the first fraudulent cheque was received it

was a transaction of a novel and, in my opinion, of a suspicious character, and I do not think that the prior pay slip transactions justified the omission of any precaution which ought otherwise to have been taken. If the first cheque transaction was suspicious, I think that each repetition of the transaction was calculated to aggravate rather than to allay suspicion. There can be no presumption that every fraud must be discovered or that discovery must be made within any given time, and, except upon the basis of some such presumption, I am unable to see why the Chartered Bank should have been entitled to assume that the absence of complaint in respect of any one transaction established the regularity of that or any subsequent transaction. In my judgment nothing short of estoppel or ratification would assist the Chartered Bank, and upon the facts I do not think that either estoppel or ratification is made out. I think therefore that the appeal fails and should be dismissed with costs.

There remains the question on the cross-appeal, whether the money paid by Lawson to Lloyds Bank ought to be treated as having diminished the damages for conversion. When Lawson was credited in his account with the Chartered Bank with the proceeds of the fraudulent cheques, he from time to time drew upon the credit balances thus created cheques either in favour of Lloyds Bank or in his own favour and used these cheques either (1.) to discharge his indebtedness to Lloyds Bank in respect of overdrafts on his account with them or other liabilities of his own to Lloyds Bank, or (2.) to supplement the balances to the credit of his account with Lloyds Bank and thus enable him to continue his drawings upon them. These sums the learned judge has allowed as a deduction from the damages for conversion. I do not think that they ought to have been so allowed. The principle of such cases as *Bannatyne* v. *MacIver* (1) has, in my opinion, no application to the facts of the present case. No part of the money wrongfully obtained from Lloyds Bank was ever paid to them or applied for their benefit as their money. The payments made by Lawson were made, as out of his own

(1) [1906] 1 K. B. 103.

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money, to discharge his own debts to Lloyds Bank, or to create, as between them and him, the relation of banker and customer, and to enable him to draw, as he did in fact draw, for further sums upon them. The damage to Lloyds Bank was not diminished by these payments. The only effect of deducting them would be either to increase the claim of Lloyds Bank against Lawson, or to leave Lloyds Bank without any right to recover the amount of them from any one at all.

I think, therefore, that the judgment below was wrong in this respect, and that the cross-appeal on this head should succeed with costs.

Appeal dismissed; cross-appeal allowed.

Solicitors for appellants: *Linklaters & Paines.*
Solicitors for respondents: *Barlow, Lyde & Yates.*

W. H. G.

THE KING *v.* COUNTY OF LONDON JUSTICES. *Ex parte* LOCKE, LANCASTER AND W. W. AND R. JOHNSON AND SONS, LIMITED.

1928
July 18, 19.

Rating—Metropolis—Practice—Valuation List—Appeal to Quarter Sessions—Time for hearing Appeal—Valuation (Metropolis) Act, 1869 (32 & 33 *Vict. c.* 67), *s.* 42, *sub-s.* 13.

The provision in s. 42, sub-s. 13, of the Valuation (Metropolis) Act, 1869, that justices at assessment (now quarter) sessions shall determine appeals against the valuation list before March 31 is imperative, but is subject to the necessary modification that if through accident, misfortune, or glut of business the justices are unable to determine an appeal before that date, it is sufficient in order to give them jurisdiction to determine it after that date that the parties shall have entered their appeal at such a time as, according to the ordinary practice of the court, would enable the justices to determine that appeal before that date.

Opinion of Lord Esher M.R. in *Reg.* v. *County of London Justices* [1893] 2 Q. B. 476, 488 approved.

When once the condition prescribed in the said sub-section is so satisfied, and a postponement to a date subsequent to March 30 has taken place, it becomes a matter for the discretion of quarter sessions to fix the date on which the hearing shall take place.

Through pressure of business an appeal could not be determined before March 31, and was postponed by quarter sessions until May. After subsequent adjournments, granted on considerations put forward by the parties, it was finally heard some two years later :—

Held, that the Court would not interfere with the discretion of quarter sessions so to adjourn the appeal, and that quarter sessions had jurisdiction to hear it.

Rule Nisi for certiorari.

The Port of London Authority (called herein "the Authority") duly gave notices of appeal and duly entered their appeals for hearing before the quarter sessions for the county of London against their assessments in various boroughs and parishes of the said county, inter alia, the borough of Poplar. On March 23, 1926, the sessions sat for the purpose of fixing dates for hearing the appeals, which numbered about two thousand, and, after hearing argument, they ordered that the appeals of the Authority should stand out until May. Owing to the fact that on the assessment of the Authority's property in the borough of Stepney similar

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questions arose as on the assessment in the borough of Poplar, the parties to the present appeal agreed by a consent in writing filed in the court of quarter sessions on September 21, 1926, that it should be adjourned pending the final decision of the former questions. On November 24, 1926, the quarter sessions affirmed a settlement of all the appeals of the Authority with the exception of the present appeal. Negotiations ensued between the parties to the present appeal, as a result of which the questions remaining for decision were greatly reduced in number, and the accounts of the Authority were fully investigated, and during those negotiations various adjournments of the appeal took place, but finally the hearing was fixed for February 14 and 15, 1928. At that hearing the gross value of 310,580*l.* was reduced to 130,000*l.*, and the rateable value from 114,576*l.* to 30,000*l.* On May 10, 1928, the present rule was obtained by the applicants, Locke, Lancaster and W. W. & R. Johnson & Sons, Ld., ratepayers in the borough of Poplar, to quash the order of quarter sessions on the ground that by reason of the provisions of s. 42, sub-s. 13, of the Valuation (Metropolis) Act, 1869 (1), they had no jurisdiction to hear the appeals.

The clerk to the County of London Quarter Sessions in an affidavit stated that owing to the impossibility of hearing and determining all appeals before March 31 it had been the practice for many years not to force on the hearing of appeals where the investigation of facts and accounts of great length and complication was involved and the parties desired time for consideration, and the Act would be unworkable if the dates prescribed by s. 42, sub-s. 13, of the Act of 1869 were held to be mandatory. He said that quarter sessions had from time to time considered the reasons for delay and had exercised their discretion accordingly.

(1) Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 42, sub-s. 13: "The justices may hold the assessment sessions at any time after February 1 in the same year, which will enable them to determine all appeals (except where a valuation list or valuation is ordered) before the ensuing thirty-first of March." By s. 42, sub-s. 10, of the Local Government Act, 1888 (51 & 52 Vict. c. 41), quarter sessions are substituted for the assessment sessions.

Whiteley K.C. and *E. H. Tindal Atkinson* for the County of London Quarter Sessions showed cause. The rule should be discharged, because quarter sessions had jurisdiction to hear the appeals after March 31. No doubt the intention of the Legislature, as appears by s. 42, sub-s. 13, of the Act of 1869, was that all appeals should be heard between February 1 and March 31, and it was held in *Reg.* v. *County of London Justices* (1) that these dates were compulsory and not merely directory. But it was also held in that case that this was subject to certain practical qualifications and exceptions, e.g., as in that case, an extraordinary glut of business in the court making it impossible to finish all the appeals in the time limited by the Act. In the present case it is made clear by the affidavit of the clerk to the quarter sessions that the Act would be unworkable if the section was held to be imperative and that it was impossible to hear these appeals before March 31, as was well known to both parties. The hearing contemplated means a proper hearing, and it was impossible to have that unless the complicated facts and figures were properly considered by the parties before the appeals came on. Some of the provisions of the Act seem to empower the court to disregard the prescribed date. Thus s. 26 of the Act of 1869 provides that sessions may adjourn from time to time, as may be necessary for the performance of their duties; s. 34 enables them to adjourn to any day beyond March 31 for the purpose of obtaining the decision of any superior Court, and Order x. of the Orders of the County of London Quarter Sessions introduces requirements with which, in a complicated case, it would be unreasonable to expect compliance before March 31.

Konstam K.C. and *E. H. Tindal Atkinson* showed cause for the Port of London Authority. The arguments already heard are adopted. Where quarter sessions in the proper exercise of their discretion have after March 31, further postponed the hearing of an appeal this Court will not interfere with their discretion.

(1) [1893] 2 Q. B. 476.

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Sydney G. Turner and *R. C. Lancaster* for the Poplar Union Assessment Committee, said they were instructed not to argue but to assist the Court.

Scholefield K.C. and *H. A. Hill* in support. The court of quarter sessions had no jurisdiction to hear these appeals. Its jurisdiction continued so long only as the necessity for further time continued, that is, the necessity of the court. In *Reg.* v. *County of London Justices* (1) quarter sessions could not hear the appeals by reason of the glut of business. Bowen L.J. said (2) that the Act "is intended to be imperative as regards the voluntary action of the parties." Here the court was ready to hear the appeal after May, 1926, and there is no suggestion that anything then prevented the appeal. In *Reg.* v. *County of London Justices* (1) the reason why the Court extended the time was that neither the quarter sessions nor the parties had wasted time. Quarter sessions cannot postpone the hearing merely by the exercise of its own discretion, and even where properly postponed the time could only be so far extended beyond March 31 as the necessity of the court demanded. Quarter sessions have a power of adjournment limited by Act of Parliament, and also a common law power. In *Redheugh Colliery, Ld.* v. *Gateshead Assessment Committee* (3) it was held that the language of the particular Act was not strong enough to limit the court's common law power to respite an appeal. But the language of s. 34 of the Act of 1869 is strong enough to limit that power. Where a date has been fixed for hearing an appeal the court cannot extend it, except in the application of the maxim "Lex non cogit ad impossibilia."

[LORD HEWART C.J. Do you mean a hearing after a fashion, or a real hearing?]

There must be a hearing before the date fixed by the subsection unless the above maxim applies to the possibility of the court being able to hear the appeal, and subsequent adjournments must also depend on the applicability of that maxim.

(1) [1893] 2 Q. B. 476. (2) [1893] 2 Q. B. 493.
(3) [1924] 1 K. B. 369.

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LORD HEWART C.J. This is a rule nisi for a certiorari to be directed to the London justices to remove an order made by them at quarter sessions upon the hearing of an appeal by the Port of London Authority against the Poplar quinquennial valuation list. The principal ground upon which the rule was obtained was that quarter sessions had no jurisdiction to make the order inasmuch as they had heard the appeal after the latest date for hearing appeals fixed by s. 42, sub-s. 13, of the Valuation (Metropolis) Act, 1869. The material facts may be quite shortly stated. In 1925 the Authority was assessed at 310,580*l.* gross and 114,576*l.* rateable. On January 14, 1926, the Authority duly gave notice of appeal against these assessments. On February 1, 1926, the case for the appellant was lodged, and on February 20 the case in answer was lodged. On March 23, 1926, by consent, quarter sessions allowed the appeals to stand over until May. We are told that at that time some two thousand appeals were pending, of which about four hundred were disposed of before the end of March. Afterwards, by successive adjournments, the appeal was heard and determined on February 14 and 15 last, and the court reduced the assessments to 130,000*l.* gross and 30,000*l.* rateable, subject however to a case to be stated for the opinion of this Court. It is in these circumstances that the applicants for this rule allege that the order reducing the assessments made by quarter sessions in February last was ultra vires and void.

That contention is based on the provisions of s. 42, sub-s. 13, of the Valuation (Metropolis) Act, 1869, which provides that the justices must hold sessions so as to enable them to determine all appeals before March 31, and other sections of the Act were referred to for the purpose of enforcing or illustrating the proposition that according to the scheme of legislation these appeals are intended to be disposed of before March 31. The substance of the complaint seems to be that if delay in hearing appeals occurs the sins of the fathers are visited on the children, or, more exactly, it results in an unequal distribution of rates among the ratepayers of different

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years. In the argument much was said about necessity being the only reasonable cause for delay, but it is difficult to see how that doctrine is to apply impartially both to the appeals at the top and those at the bottom of a list of 2000 appeals.

. . . aequa lege necessitas
sortitur insignes et imos. (1)

This matter was considered in *Reg.* v. *County of London Justices* (2), and, although thirty-five years have since elapsed no later decision has dealt with it, and we are told that the practice here complained of has been consistently followed since that case. Lord Esher said (3) that he did not think that the rule was merely directory, and continued: "I think it is imperative; but I shall have presently to state what practical limitation or explanation I think can be put upon it; but I think it is a limitation of time enacted, and imperatively enacted, by the statute. . . . . This Act must be read as all enactments are, subject to their not being made absurd by matters which never could have been within the calculation or consideration of the legislature, and I think we must say that the Act is satisfied if the parties have entered their appeal within such a time as, according to the ordinary practice of the court, would enable that particular case to be heard and determined by March 30, and that therefore the glut of business in the court, and the inability of the court to cope with it, is not to be brought into play against the parties, who as far as they are concerned have obeyed the imperative enactment of the statute by putting down their appeal at a time which would enable the court, according to its ordinary course of practice, to hear and determine the case by March 30." Similar language was used by Bowen and Kay L.JJ. Indeed, while Lord Esher regarded the language of the section as imperative, Bowen L.J. apparently regarded it as occupying a midway position between imperative and directory (4), and Kay L.J. as

(1) Horace. Odes, III. i. 14.
(2) [1893] 2 Q. B. 476.
(3) [1893] 2 Q. B. 488.
(4) Ibid. 491.

directory only. (1) I think that the law must be taken to be as it was stated by Lord Esher in the passage from his judgment which I have read.

In the present case it is common ground that the above-named conditions were fulfilled, and that it was impossible for quarter sessions to dispose of this appeal in that year before March 31, and, as to the subsequent period of delay, we have the uncontradicted affidavit of the clerk to the quarter sessions, who, after reviewing the whole history of the matter in detail, sums it up in para. 21 in these words: "The court of quarter sessions did not allow time to pass by without seeking to bring the appeal to hearing, but was always ready and willing to hear the appeal. The court from time to time had to consider and did consider the reasons for delay, and exercised its discretion in allowing postponements and ultimately fixing the date of hearing." In my opinion when once the condition prescribed by the Act is satisfied in the manner explained by Lord Esher, and an adjournment to a date later than March 30 has taken place, it becomes a question for the discretion of quarter sessions to fix the date on which the hearing shall take place. It seems to me, with great respect, idle to contend in this Court that some sort of hearing might conceivably have taken place earlier. The hearing which is necessary is a proper and adequate hearing upon sufficient and suitable materials, and where it appears that quarter sessions have addressed their minds to the question whether delay is reasonable and necessary for the purpose of securing an adequate hearing this Court cannot minutely inquire into the circumstances under which postponements were granted, nor embark on an attempt to solve the insoluble problem whether on each occasion the discretion of quarter sessions was exercised in an ideal manner. It is sufficient to say that in this case the discretion was exercised upon the true question—namely, what was the proper date to fix for the adequate hearing of this appeal. It appears to me upon the facts that there is no ground for the contention that quarter sessions had no jurisdiction or that

(1) [1893] 2 Q. B. 497.

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their order was ultra vires. The rule, I think, must be discharged.

ACTON J. I agree.

BRANSON J. I agree.

Rule discharged.

Solicitors showing cause for the justices: *E. W. & Bruce Beal.*

Solicitor showing cause for the Port of London Authority: *J. D. Ritchie.*

Solicitors in support: *Charles G. Bradshaw & Waterson.*

Solicitor for the Poplar Assessment Committee: *W. H. Thompson.*

W. L. L. B.

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July 3.

ELWELL *v.* CRANE FOUNDRY COMPANY, LIMITED.

Workmen's Compensation—Unsuccessful Application by Workman—Order to pay Employer's Costs—Taxation—Taxing Fee paid by Employer, whether repayable by Workman—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *Sch. I., paras.* 7, 12—*Workmen's Compensation Rules*, 1926, *r.* 76—*County Court Fees Order*, 1925, *Schedule, s. III.*

By the Workmen's Compensation Act, 1925, Sch. I., para. 12: "No Court fee shall be payable by a workman in respect of any proceedings in a Court under this Act":—

Held, that the paragraph did not exempt a workman from repaying to the employer the taxing fee paid by him for ascertaining the amount of his costs of an unsuccessful application by the workman which the workman had been ordered to pay.

APPEAL from an award of the judge of the Wolverhampton County Court sitting as arbitrator under the Workmen's Compensation Act, 1925.

A workman met with an accident whilst in the employment of the employers. He subsequently commenced arbitration proceedings for compensation. The county court judge made an award in favour of the employers, and ordered the workman to pay their costs on scale B. In default of agreement between the parties, the costs were taxed at

22*l.* 16*s.* 5*d.* On that sum a taxing fee of 11*s.* 6*d.*, being 6*d.* in the pound, was paid by the employers, which the workman refused to repay on the ground that he was immune from payment of Court fees under para. 12 of Sch. I. to the Workmen's Compensation Act, 1925, which provided that "No Court fee shall be payable by a workman in respect of any proceedings in a Court under this Act." The county court judge, on the matter being brought to his attention, gave leave to the employers to levy execution for the 11*s.* 6*d.* on the grounds (1.) that the workman was not being asked to pay a Court fee, but an item of expenditure necessarily incurred by the employers; and (2.) that a taxation proceeding was not a proceeding under the Workmen's Compensation Act, 1925.

The workman appealed. The appeal was heard on July 3, 1928.

Cave K.C. and *C. A. Collingwood* for the appellant.

R. H. Norris for the respondents.

The arguments sufficiently appear from the judgments.

LORD HANWORTH M.R. This appeal raises an important and interesting point. The facts can be stated in the smallest compass. An accident took place, and the workman had need to apply, under the Workmen's Compensation Act, 1925, to the county court, which is the arbitration Court designated for the hearing of such matters, and on the hearing of the arbitration proceedings, which took place between the workman and the employers, the award was made in favour of the employers, and the workman was ordered to pay their costs. Those costs were taxed at a sum of 22*l.* 16*s.* 5*d.*, and in reference to that taxation there was also another expense incurred by the employers—namely, 11*s.* 6*d.*, which was the cost of ascertaining what was the amount of the costs which the workman was to pay to them. The workman has paid the sum of 22*l.* 16*s.* 5*d.* without question. He was unsuccessful, and he submitted to the order made against him, and he has paid those costs, but he has declined

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to pay one item of the costs—namely, 11*s.* 6*d.* for the taxation fee on the ground that he, the workman, is rendered immune from the liability to pay such a fee. The county court judge gave leave, on the matter being brought to his attention, to issue execution against the workman for the 11*s.* 6*d.*, and from that order an appeal is brought to this Court.

The question thus is neatly raised whether or not the workman is immune from the payment of this expense incurred by the employers in estimating what the amount of the costs was that they were to charge against the workman.

It is necessary to see where the liability for costs of the employers arises. It is provided by Sch. I., para. 7 (1.), of the Workmen's Compensation Act, 1925, that: "The costs of and incidental to the arbitration and proceedings connected therewith shall be in the discretion of . . . . the judge of the county court, subject as respects such judge . . . . to Rules of Court." By the Workmen's Compensation Rules, 1926, r. 76, it is provided that: "Any costs of and incidental to an arbitration" (I am leaving out the irrelevant words) "directed by the judge to be paid by one party to another shall, in default of agreement between the parties as to the amount of such costs, be taxed according to such one of the scales of costs applicable to actions in the county court as the judge shall direct." In the present proceedings the decision of the arbitrator, who was the county court judge, was in favour of the employers. Acting upon the discretion given him by para. 7 of Sch. I., he decided that the costs of those proceedings should be paid by the workman, and, incidentally, therefore, the amount of costs that were to be paid by the workman to the employers had to be ascertained by taxation in accordance with r. 76, because there was no agreement as to the amount of them entered into between the parties. That being so, and the matter having to go to taxation, the employers carried in their bill, and were then charged, in the ordinary course, a sum which amounted to this 11*s.* 6*d.*, in accordance with s. V. of the Table in the

Schedule to the County Court Fees Order, 1925. That Order provides (s. 1) that "The fees set out in the Table contained in the Schedule to this Order shall be taken in county courts in respect of the proceedings described in the second column thereof, in accordance with and subject to the directions contained therein whether prefixed to or included within any section of the said Table." The schedule which contains the Table of Fees is divided into sections. Sect. III. provides for the fees payable on proceedings under the Workmen's Compensation Acts. Sect. V. provides for the fees payable on the taxation of costs and expenses. So far, there is nothing to indicate that a workman is to be immune from the costs of the employer which have been incurred by him in the ascertainment of the amount of the costs by taxation, but by para. 12 of Sch. I. of the Act of 1925 it is provided that: "No Court fee shall be payable by a workman in respect of any proceedings in a Court under this Act." It is noticeable that in s. III. of the Table of County Court Fees to which I have referred a special proviso is entered under that section III. relating to the fees payable on proceedings under the Workmen's Compensation Act, which says that no fee is payable by a workman. So far, therefore, as s. III. goes, it contains on its face a reference to para. 12 of Sch. I., and expressly shows that none of those fees payable on proceedings under the Workmen's Compensation Act are to be charged against a workman. But now it is said that the same principle applies to s. V., which prescribes the fees payable on the taxation of costs and expenses. It is noticeable, however, not that it is a matter which guides my judgment, that under s. V. there is no such proviso as appears under s. III. It is argued by Mr. Cave, however, that the county court judge was wrong in ordering execution to issue, because para. 12 of this Sch. I. by which no Court fee shall be payable by a workman in respect of any proceedings in a Court is very wide in its terms, and that if the workman is to reimburse the employer the fee which the employer has paid on taxation of his, the employer's, costs, in effect the workman is paying a Court fee.

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My mind has fluctuated in the course of the argument a good deal, and I am by no means sure that I have reached the right decision; but, as at present advised, it seems clear to me that those words in para. 12 do not exclude the liability of the workman to repay a sum properly incurred by the employers in ascertaining the amount of the costs which the workman undoubtedly has to pay. I attach no importance to the precedents to which we have been referred, nor to the practice which we have been told exists on one side or the other in particular Courts, under which the workman has paid, or has not paid, similar sums in the past. We have to construe the words of the Schedule to the Act.

It appears to me that those words are introduced in order to make the path of the workman towards arbitration smooth and easy, and not to encumber or place difficulties in his way by making him have to provide sums of money for the payment of Court fees on his approach to the arbitration before the Court. No Court fee is to be paid by him as a condition precedent to his case being heard. On the other hand, it appears to me too wide an interpretation to say that that excludes his liability to reimburse a sum which has been estimated as the costs of the employer. After all, those costs which the workman is ordered to pay have to be estimated and computed in some manner, and under r. 76 which I have read, they have to be computed by taxation, and if the employer is to secure taxation he must pay a fee for that process. It is one of the outlays which he has to make for the purpose of quantifying the sum which he shall be capable of charging under the award made in his favour against the workman. It is incidental to the employer's rights. I think, therefore, that the fee is not covered by the words: "No Court fee shall be payable by a workman." True, as Mr. Cave says, that indirectly the workman is paying a fee, because he is reimbursing to the employers a fee which the employers have been bound to pay, and that is indirectly putting a charge upon the workman, for this 11*s.* 6*d.* represents an outlay in respect of a Court fee, but considering the purpose of para. 12 of Sch. I., namely, to lay open the Courts by an

easy approach to the workman, I do not think those words are apt to exclude from the costs which the employers are entitled by the order of the county court judge to receive from the workman the sum which the employers had necessarily to incur in the ascertainment of those costs. When one turns to the bill of costs, it is true no Court fees are charged in it because of the immunity given to the workman, but a number of items are charged which are incidental to the defence made by the employers, and the outlay on those costs the workman has to reimburse to the employers. In saying in the judgment that the workman is to pay the costs of the employers I think that order includes what is a necessary expense incurred by the employers in discovering what sum they are entitled to charge against the workman, even though it may, in effect, be the repayment of an outlay on Court fees. It does not appear to me that para. 12 enures to safeguard the workman from that reimbursement. It is not a fee payable by a workman, but it is a repayment to the employers of a sum which they had necessarily to outlay in respect of their costs, the total of which they had by some means or another to ascertain.

For these reasons it appears to me that the county court judge was right, and, therefore, that the appeal must be dismissed with costs.

LAWRENCE L.J. I agree. The answer to the question raised on this appeal depends upon the true scope and effect of para. 12 of Sch. I. of the Act of 1925.

The learned county court judge, by his award, ordered the workman to pay the employers' costs. Those costs were brought in for taxation, and under the Rules of Court a taxation fee had to be paid by the employers before they could get their allocatur; therefore it is not disputed that the fee so paid was an expense properly incurred by the employers as part of their costs of the proceedings.

Now it is said that para. 12 prevents the employers from recovering from the workman the taxation fee so paid by them. I agree that the taxation fee is a Court fee, and I further

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agree that it was incurred in respect of proceedings under the Workmen's Compensation Acts; but where I differ from the contention of the appellant is that in my opinion it was not a Court fee *payable by the workman*. In my judgment, para. 12 frees a workman from having to pay any Court fees, but does not free him (when ordered to pay the employers' costs) from having to reimburse the employers the amount paid by them for a Court fee which they have been obliged to pay. In my opinion an order against the workman to pay the employers' costs covers all such costs as the employers have properly incurred in bringing or resisting the proceedings. I think it is incorrect to say that by making the workman pay the item in the employers' costs representing the Court fee which they have had to pay the Court is, in effect, making the workman pay a Court fee contrary to the provisions of para. 12. The Court fee was a Court fee payable and paid by the employers and constitutes part of their costs of the proceedings. There is nothing in para. 12 to prevent the Court from ordering the workman to pay all the costs properly incurred by the employers. In making such an order I am of opinion that the Court is not making the workman pay a Court fee contrary either to the letter or to the spirit of para. 12. A workman is immune from having himself to pay any fees to the Court, and thus has the privilege of approaching the Court without having to do what the employers have to do—namely, pay Court fees, but para. 12 does not in my opinion go beyond that. For these reasons I agree with the Master of the Rolls that this appeal fails.

SANKEY L.J. I agree. I at first thought that the appellant was entitled to succeed, but Mr. Norris has persuaded me that the judgment appealed from is correct.

In my view the object of the legislation was to provide for injured workmen a free access to the county court. In other cases litigants who desire to invoke the assistance of the Court have to pay a number of different fees. They may have to pay a fee upon entry of the plaint; upon the trial or the hearing of the case; of entering judgment by default,

and so forth, but the object was, in the Workmen's Compensation Act, to free the injured workman from any such fees. I rather read that sentence: "No Court fee shall be payable by a workman in respect of any proceedings in a Court under this Act" in the following way: "No fee shall be payable to the Court by a workman in respect of any proceedings in a Court under this Act." I do not think that the fee in question, which was a fee incurred by the employers in taxing their bill of costs, comes within para. 12 at all. In my opinion the decision of the learned county court judge was quite right, and, having listened to the arguments of Mr. Norris, I am satisfied that this appeal should be dismissed.

Appeal dismissed.

Solicitor for appellant: *Herbert H. Moseley, for W. A. & H. M. Foster, Wolverhampton.*

Solicitors for respondents: *Berrymans, for T. Haynes Duffell, Birmingham.*

W. I. C.

ADAMS *v.* CAMFONI.

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Licensing—Sale of Liquor during prohibited Hours—Licensee—Liability for Acts of Servant—Licensing Act, 1921 (11 & 12 *Geo.* 5, *c.* 42), *s.* 4 (*a*).

By s. 4 of the Licensing Act, 1921, "no person shall, except during the permitted hours (*a*) either by himself, or by any servant or agent, sell or supply to any person in any licensed premises or club any intoxicating liquor."

A servant of the respondent employed as a messenger or errand boy in the business of the respondent, an off-licence holder, without the knowledge of the respondent, sold in the licensed premises two bottles of whisky to a customer during other than permitted hours. He had no express or implied authority to sell any part of the respondent's stock; he was not left in charge of the premises, nor had he ever taken any part in selling any of the above stock to customers nor been employed in any capacity other than that of messenger or errand boy:—

Held, that the respondent was not liable to be convicted under the section, because a licensee is not an insurer that no unauthorized person on the premises will do the acts prohibited by the statute.

CASE stated by the Cardiff stipendiary magistrate.

The respondent, Alfonso Camfoni, the holder of an off-licence in respect of 168 Bute Street, Cardiff, was on January 18,

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1928, charged on an information by the appellant, Sidney Adams, an inspector of police, for that he on December 14, 1927, did unlawfully, by his agent, sell whisky to one George Paris during other than permitted hours, contrary to s. 4 of the Licensing Act, 1921 (11 & 12 Geo. 5, c. 42), which provides that "no person shall, except during the permitted hours—(*a*) either by himself, or by any servant or agent, sell or supply to any person in any licensed premises or club any intoxicating liquor."

One Ernest John, a youth of sixteen years of age, was in the employment of the respondent as an errand or messenger boy in connection with the said business carried on at 168 Bute Street. On December 14, 1927, at a time when the premises were not open for business, and at a time other than within the permitted hours, John, in the temporary absence of the respondent and his manager, Angel Gonzalez, served the said Paris with two bottles of whisky. No payment was received therefor by John. When charged, the respondent said: "John has no right to supply anything at all." No evidence was called to show that John had express or implied authority either on December 14 or at any other time to sell to or supply to any customer any part of the stock at 168 Bute Street, or that he had been left in charge of the premises at any time, or had ever taken part in selling or supplying to customers any of the said stock; or had ever been employed by the respondent or his manager in any capacity other than that of an errand or messenger boy.

The magistrate dismissed the information, but stated this case.

P. B. Morle for the appellant. The question is as to the liability of a master for the acts of his servant for acts done not within the scope of his authority. It is submitted that in this case the respondent was liable for those acts. The Legislature intended to throw upon licence holders the responsibility of seeing that customers are not supplied with alcohol during prohibited hours. They must select reliable

servants. In *Williams* v. *Pearce* (1), a case under a regulation made under the Defence of the Realm Regulations applying to Cardiff, from which the language of s. 4 of the Licensing Act, 1921, is taken, the licensee was held liable for the act of his agent, although he was unaware of it and had not delegated his authority to her. It is immaterial that the act done by the servant is not within the scope of his authority provided it is done by him in his capacity as servant.

[*Emary* v. *Nolloth* (2) was also referred to.]

Joshua Davies for the respondent was not called upon to argue.

LORD HEWART C.J. This is a case stated by the stipendiary magistrate at Cardiff, and arises out of a prosecution of the respondent by an inspector of police of Cardiff for unlawfully supplying whisky in licensed premises during other than permitted hours. The magistrate dismissed the case, and the question for this Court is whether upon the facts he was right in his determination. The case is somewhat incompletely stated and leaves us a little uncertain with regard to some matters. But it appears that two bottles of whisky were supplied at a time when the respondent's premises were not open for business, and were supplied by one Ernest John, a youth of sixteen years of age, whose employment was that of messenger boy. When he was charged the respondent said: "John has no right to supply anything at all." The case does not make it clear whether John was honestly, though mistakenly, intending to serve his master's interests in supplying his master's customer on credit, or whether he was acting dishonestly and supplying his master's goods to serve his own ends.

It has been contended that on these facts the magistrate had no choice but to convict, because s. 4 of the Licensing Act, 1921, makes the respondent, it is said, an insurer warranting that neither he nor anybody else on his premises will supply his goods to customers during other than the permitted hours. I cannot find any such meaning in the

(1) (1916) 80 J. P. 229. (2) [1903] 2 K. B. 264.

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section. It is said to reproduce a regulation of the Defence of the Realm Regulations. But it does not appear that the construction contended for has ever been put upon it; on the contrary, in *Williams* v. *Pearce* (1), a case decided on these words in the relevant regulation, Lord Reading C.J. said (2): "This regulation only carries out the policy manifested in the Licensing Acts. It is nothing new. I cannot find in the authorities to which our attention has been called anything which assists the contention for the respondent on this point." That view was concurred in by Sankey and Low JJ. On the evidence in the present case the magistrate came to the conclusion that what happened was something of an accidental kind, done by one who, no doubt, in a sense was in the respondent's service, but against orders, and not done in the course of performing any duty delegated to him by the respondent. In my opinion it is impossible to say that the magistrate was wrong, and the appeal should be dismissed.

ACTON J. I agree.

BRANSON J. I agree.

Appeal dismissed.

Solicitors for appellant: *Smith, Rundell, Dods & Bockett, for C. G. Brown, town clerk, Cardiff.*

Solicitors for respondent: *Pritchard, Englefield & Co., for W. B. Francis & Son, Cardiff.*

(1) 80 J. P. 229. (2) 80 J. P. 232.

W. L. L. B.

THE KING *v.* JOB WHITEHEAD.

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July 31.

Criminal Law—Carnal Knowledge of Girl under sixteen Years of Age—Corroboration—Inference by Jury as to what Girl told her Mother from what Mother did—Arrest of accused Person—Caution by Police Officer—Failure to deny Charge by accused Person.

On the trial of a prisoner for having had unlawful carnal knowledge of a girl under sixteen years of age, the judge directed the jury that although what the girl said to her mother several months after the offence was committed was not evidence, yet the jury could infer what the girl said, namely, that the prisoner was responsible for her condition, from what the mother did, because the prisoner was at once accused, and that that amounted to corroboration of the girl's story. Further, that the fact that the prisoner when he was charged by a police officer and cautioned made no denial of the charge was also corroboration of her story :—

Held, that both directions were wrong. Any inference as to what the girl told her mother could not amount to corroboration of the girl's story, as it proceeded from the girl herself and the girl could not corroborate herself. The fact that the prisoner when charged and cautioned made no denial of the charge could not be corroboration.

APPEAL against a conviction.

The appellant, Job Whitehead, was tried at the Glamorgan Assizes at Swansea before Humphreys J. upon a charge of having had unlawful carnal knowledge of a girl of the age of fifteen years in October and November, 1927, whilst she was in his service.

He pleaded not guilty to the charge.

When a summons for carnally knowing a girl between the age of thirteen and sixteen years was served upon the appellant, the police constable who served the summons, after reading it over to the appellant, cautioned him, and in answer to the charge the appellant said : "I don't wish to say anything now."

In the course of summing up the case to the jury Humphreys J. said : "The evidence in this case is almost entirely the evidence of the girl herself. . . . . In law you are perfectly entitled to convict the prisoner upon her evidence, if you believe it, without any question of corroboration at all, but it has always been the practice of judges in cases of this character to warn juries of the danger of convicting

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any one upon the entirely uncorroborated evidence of the girl." He then set out the story of the girl, and continued: "Let us see if there is in this case anything which you might rightly regard as corroboration. It is my duty to tell you what may be corroboration. It is your duty to see whether the evidence does amount to corroboration. . . . . Then there comes something which you may regard as something more important in the way of corroboration. . . . . The girl's condition was noticed by her mother . . . . in January [1928] . . . . and she spoke to the girl. In my judgment what the girl said to her is not admissible in evidence, but you know what the girl said—it is obvious—because you know what the mother did. As soon as the girl spoke to her she took her to the doctor, and the doctor said she was pregnant, and it is perfectly clear that the girl must have at once said that it was the prisoner who was responsible for her condition, because the prisoner is at once accused. The accusation takes the form of the mother going to a magistrate and laying an information, as a result of which a summons is granted. First of all the girl leaves the prisoner's house; the mother takes the girl away, and she leaves on February 11. Upon February 13 a police-constable goes and serves the summons upon the prisoner. The silence of a man who is accused of a crime, his failure to make any answer or to show any indignation may be corroboration, but whether it is corroboration in a particular case is a matter for a jury to decide. It is for you to decide whether it is corroboration or not according to whether you think a respectable man if he was innocent would make an answer to such a charge. The police officer said he told him [the prisoner] exactly what he was accused of and read the summons to him, which accused him of carnally knowing M. M. J., a girl of the age of fifteen years. According to the police officer the only answer was: 'I don't wish to say anything now.' There was no sort or kind of denial. . . . . If you think the failure on his part to make a denial when the charge was sprung upon him by the police officer corroborates her evidence, then you will probably more

readily accept her evidence as being corroborated to that extent."

The appellant was found guilty by the jury and was sentenced to fifteen months' imprisonment with hard labour.

The appeal against conviction was based upon misdirection.

Bertram Reece for the appellant was stopped.

T. W. Langman for the Crown. The appellant was properly convicted. The judge did not tell the jury that the silence of the appellant when charged with the offence amounted to corroboration of the girl's story, but that it might amount to corroboration, and that it was for the jury to say whether in fact it did amount to corroboration. Lord Alverstone C.J. in *Rex* v. *Tate* (1) said: "What was relied upon by the prosecution as corroboration was the fact that the prisoner, when formally charged by the police constable, made no reply. It may be that in some cases the absence of an indignant repudiation of a charge might be some corroboration." That is a very clear expression of opinion, which supports the contention of the Crown in the present case—namely, that the failure of the appellant when charged to deny the charge may amount to corroboration.

The judgment of the Court (LORD HEWART C.J., SWIFT and BRANSON JJ.) was delivered by

LORD HEWART C.J. The appellant in this case was convicted of having had unlawful carnal knowledge of a girl under sixteen years of age. This is not a case like *Reg.* v. *Lillyman* (2) or *Rex* v. *Osborne* (3), because in those cases the complaint was made at the first opportunity which reasonably offered itself after the offence was committed, whereas in the present case the complaint was not made until after the lapse of several months. In summing up the case to the jury the judge used these words: [His Lordship read the passage from the summing up set out above, and continued:] It is said that the opening portion of that passage was likely to convey to the minds of the jury that although the girl's

(1) [1908] 2 K. B. 680, 683. (2) [1896] 2 Q. B. 167.
(3) [1905] 1 K. B. 551.

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statement to her mother was in the circumstances not admissible in evidence, nevertheless the jury could draw the inference, from what the mother did, that the girl had said that the appellant was responsible for her condition, and that that amounted to corroboration of the girl's story. That direction would be wrong. Any such inference as to what the girl had told her mother could not amount to corroboration of the girl's story, because it proceeded from the girl herself; it was merely the girl's story at second hand. In order that evidence may amount to corroboration it must be extraneous to the witness who is to be corroborated. A girl cannot corroborate herself, otherwise it is only necessary for her to repeat her story some twenty-five times in order to get twenty-five corroborations of it. I am not sure, however, that that is what the judge really meant. It would seem rather that what he said was intended only to be introductory to what he subsequently told the jury—namely, that the jury were entitled to say that the fact that the appellant, when charged, did not make any denial of the charge amounted to corroboration of the girl's story, notwithstanding that the police officer when he read the charge over to the appellant gave him a warning that he need not say anything in answer to the charge unless he wished to do so, but that whatever he said would be taken down in writing and might be given in evidence. To say that silence after such a warning may be treated as corroboration of the evidence of the prosecutrix appears to us to be a misdirection. It goes beyond anything that was said in *Rex* v. *Tate*. (1) The appeal must therefore be allowed and the conviction quashed.

Appeal allowed.

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*

Solicitor for Crown: *Director of Public Prosecutions.*

(1) [1908] 2 K. B. 683. According to the report of that case in 99 L. T. 620, 621 Lord Alverstone C.J. said: "The non-denial of the offence by the prisoner, when formally charged by the police, is not corroboration. We are far from saying that evidence of non-denial cannot be corroboration, for in some cases the absence of indignant denial would amount to that, but non-denial of a formal charge made by the police is not, or may not be, on the same footing."

R. F. S.

Considered. LAZARUS-BARLOW v. REGENT ESTATES CO. LD. [1949] 2 K. B. 465

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June 19, 20, 21, 22; *July* 17.

LLOYD *v.* COOK.

GOUDGE *v.* BROUGHTON.

SIMSON *v.* MIATT.

BARTRAM *v.* BROWN AND OTHERS.

BARKER *v.* HUTSON.

Landlord and Tenant—Rent Restriction—Dwelling-house—Decontrol—"Landlord"—"In Possession"—"Coming into Possession"—Lessee—Ground Rent—"Tenant"—Grant of Lease by Landlord—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*f*), (*g*); *sub-s.* 7—*Rent and Mortgage Interest Restrictions Act*, 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 2, *sub-ss.* 1, 2.

By the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 1 (*f*), the expressions "landlord" and "tenant" include any person from time to time deriving title under the original landlord or tenant, and (*g*) the expression "landlord" also includes in relation to any dwelling-house any person, other than the tenant, who is or would but for this Act be entitled to possession of the dwelling-house, and the expressions "tenant and tenancy" include sub-tenant and sub-tenancy, and the expression "let" includes sub-let.

By sub-s. 7, "Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy . . . . and this Act shall apply in respect of such dwelling-house as if no such tenancy existed or ever had existed."

By the Rent and Mortgage Interest Restrictions Act, 1923, s. 2, sub-s. 1, "Where the landlord of a dwelling-house to which the principal Act" [Increase of Rent and Mortgage Interest (Restrictions) Act, 1920] "applies is in possession of the whole of the dwelling-house at the passing of this Act," [July 31, 1923], "or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house". . . . :—

Held, by the Court (Scrutton, Greer and Sankey L.JJ.) that "landlord" in s. 2, sub-s. 1, of the Act of 1923 does not necessarily imply the existence of a tenant or tenancy, but that a freeholder who has never let the dwelling-house to a tenant, or who has no tenant, may be a landlord within the meaning of the sub-section.

Held also that, apart from the proviso to s. 2, sub-s. 1, of the Act of 1923, when the Act of 1920 ceases to apply to a dwelling-house it

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ceases to apply to every part thereof, but that by virtue of the proviso a dwelling-house, being a part lawfully sub-let of a larger dwelling-house, is still within the Act of 1920, although the mesne landlord is in or comes into possession of it.

Held, by Greer and Sankey L.JJ., that a lessee or other tenant of a dwelling-house may be a landlord within the meaning of s. 2, sub-s. 1, of the Act of 1923.

Held, by Scrutton L.J., that, apart from s. 12, sub-s. 7, of the Act of 1920, a person who is himself a tenant cannot be a landlord, but that by virtue of that sub-section, and of s. 2 of the Act of 1923, where a tenant of a dwelling-house, holding at a rent which is less than two-thirds of the rateable value of the dwelling-house, is in actual possession of the same, he may be a landlord within the meaning of s. 2, sub-s. 1, of the Act of 1923. Therefore:—

(1.) Where a lessee had before the Act of 1923 let three rooms in a house to a tenant who gave up possession after that Act, and the lessee then let two of the three rooms to a new tenant, no point being taken in the county court that the lessee could not be a landlord, or that the rent reserved on the lease was less than two-thirds of the rateable value, so that the lease could be disregarded under s. 12, sub-s. 7, of the Act of 1920, or that there had been a sub-letting of the dwelling-house within the proviso to s. 2, sub-s. 1, of the Act of 1923:—

Held, that the landlord having come into possession of the three rooms after the passing of the Act of 1923 the Act of 1920 had ceased to apply to the two rooms.

Cohen v. *Gold* [1927] 1 K. B. 865 overruled; *Lloyd* v. *Cook* [1928] 2 K. B. 364 reversed.

(2.) Where a man bought a cottage after the Act of 1923, which had never been previously let, and being in possession of it, let it to a tenant at a rent which was within the limits of the Rent Restriction Acts:—

Held, that the landlord had come into possession of the cottage after the passing of the Act of 1923, and that the Act of 1920 had ceased to apply to it.

(3.) Where a sub-lessee of a dwelling-house of the rateable value of 58*l.* purchased in 1925 the reversion on his lease, and by so doing became tenant to the freeholders at a ground rent of 10*l.* a year, and then in 1926 let three rooms to a sub-tenant at 25*s.* a week:—

Held, that by virtue of s. 12, sub-s. 7, of the Act of 1920, and s. 2, sub-s. 1, of the Act of 1923, the tenant was the landlord of the dwelling-house, and that as he came into possession of the whole of the dwelling-house after the passing of the later Act the earlier Act had ceased to apply to the dwelling-house, and consequently to every part thereof.

Quaere concerning the ratio decidendi of *Brookes* v. *Liffen* [1928] 2 K. B. 347.

(4.) Where the freeholders of a house being in actual possession of it granted a lease for two years to a lessee in 1926, and in 1927 the lessee let two rooms in the house to a tenant at a rent which was within the limits of the Rent Restriction Acts:—

Held, that the Act of 1920 did not apply to the two rooms.

Joy v. *Eppner* [1925] 1 K. B. 362; *Dunbar* v. *Smith* [1926] 1 K. B. 360; *Catto* v. *Curry* [1926] 1 K. B. 460; *Finey* v. *Gougoltz* [1926] 2 K. B.

322; *Doulin* v. *Parcell* (1927) 136 L. T. 633; *Ratkinsky* v. *Jacobs* (1928) p. 24 above, 138 L. T. 739 approved.

Jenkinson v. *Wright* [1924] 2 K. B. 645 approved by Greer and Sankey L.JJ., commented upon by Scrutton L.J.

Oakley v. *Wilson* [1927] 2 K. B. 279 disapproved by Scrutton L.J.; *semble* approved by Greer and Sankey L.JJ.

By s. 2, sub-s. 2, of the Rent and Mortgage Interest Restrictions Act, 1923: "Where, at any time after the passing of this Act, the landlord of a dwelling-house to which the principal Act applies grants to the tenant a valid lease of the dwelling-house for a term ending at some date not earlier than one year after the date fixed at the time at which the lease is granted for the expiration of the principal Act" [see 15 & 16 Geo. 5, c. 32, s. 1, sub-s. 3] "being a term of not less than two years, or enters into a valid agreement with the tenant for a tenancy for such a term, the principal Act shall, as from the commencement of the term, cease to apply to the dwelling-house. . . . . Provided that where part of the dwelling-house is lawfully sub-let at the commencement of the term, and is a dwelling-house to which the principal Act applies, that part shall, notwithstanding anything in the foregoing provisions of this sub-section, continue to be a dwelling-house to which the principal Act applies."

(5.) Lessees at a rent of 80*l.* a year of a house in London, which was in the occupation of a tenant, sub-let the house to one R., while the tenant was still in occupation, for a term of more than two years ending after the date indicated by the above sub-section:—

Held, that the words "the tenant" mean a person in occupation as tenant of the dwelling-house at the time when the lease mentioned in the sub-section is granted; and that, R. not being such a person, the sub-section did not apply, and that the Act of 1920 continued to apply, to the dwelling-house.

LLOYD *v.* COOK.

APPEAL from the decision of a Divisional Court (1) reversing the judgment of the Bloomsbury County Court.

The defendant, Mrs. Cook, in 1913 purchased the unexpired portion of a lease originally granted for ninety-nine years of a house, No. 14 Eversholt Street, Camden Town, N.W. At some time between 1913 and 1917 she let three rooms on the third floor of the house as a separate dwelling-house to one Churchman on a weekly tenancy at 8*s.* 6*d.* a week. He left the rooms on August 12, 1926. The defendant then resumed possession of the three rooms. She prepared one of them for the use of her son, who occupied it as soon as it was ready. She caused the other two rooms to be white-washed and papered, with the intention of letting them.

(1) [1928] 2 K. B. 364.

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On August 28, 1926, she let these two rooms to the plaintiff on a weekly tenancy at 14*s.* a week.

On August 10, 1927, the plaintiff applied to the county court to have the rent of the house apportioned under s. 12, sub-s. 3 (1), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, for the purpose of determining the standard rent of the two rooms let to him. The registrar granted the application and fixed the standard rent of the two rooms at 5*s.* 8*d.* On an appeal by the defendant the county court judge held that the defendant was the "landlord" of the dwelling-house consisting of the three rooms let to Churchman; that on the termination of his tenancy she came into possession of the whole of that dwelling-house within the meaning of s. 2, sub-s. 1, of the Rent and Mortgage Interest Restrictions Act, 1923 (1), whereupon the Act of 1920 ceased to apply to it, and that consequently the plaintiff was not entitled to have the rent of the house apportioned.

The plaintiff appealed. The Divisional Court (Salter and Charles JJ.), following *Cohen* v. *Gold* (2), reversed the decision of the county court judge and entered judgment for the plaintiff.

The defendant appealed.

Montgomery K.C., *J. C. Lockwood* and *Gordon Clark* for the appellant. When the appellant came into possession of the three rooms which had been let to Churchman, that is on August 12, 1926, after the passing of the Act of 1923, those three rooms became decontrolled. *Cohen* v. *Gold* (2), relied on by the Divisional Court, is inconsistent with the earlier decision of *Finey* v. *Gougoltz* (3) and with the later decision of *Ratkinsky* v. *Jacobs* (4), where the facts, so far as material, are on all fours with those in the present case. When the whole of a dwelling-house is decontrolled every part of it is decontrolled: *Prout* v. *Hunter*. (5) Therefore the two rooms let to the respondent in August, 1926, were

(1) See headnote.
(2) [1927] 1 K. B. 865.
(3) [1926] 2 K. B. 322.
(4) 138 L. T. 739; since reported p. 24 above.
(5) [1924] 2 K. B. 736.

decontrolled. Either they did not become controlled again by being let afterwards, or if they did, they became controlled as a new dwelling-house first let as such in 1926, in which case the rent at which they were then let is the standard rent: s. 12, sub-s. 1 (*a*), of the Act of 1920; and there is no ground for apportionment.

[SCRUTTON L.J. The appellant was herself a lessee and therefore a tenant within s. 12, sub-s. 1 (*f*) (1), of the Act of 1920. If she has "lawfully sub-let" the two rooms to the respondent what is the effect of the proviso to s. 2, sub-s. 1, of the Act of 1923: *Catto* v. *Curry* ? (2)]

That point was not raised in the county court and cannot be taken here. And therefore it was not necessary for the appellant to rely upon s. 12, sub-s. 7 (1), of the Act of 1920, and contend that the ground rent was such that the long lease might be ignored and that the appellant was the "landlord."

John Duncan for the respondent. The wording of s. 2, sub-s. 1, of the Act of 1923 is very ambiguous. The terms "landlord," "dwelling-house," and "possession," and the phrase "cease to apply," all require definition. Apart from s. 12, sub-s. 7, of the Act of 1920, a tenant cannot be a landlord within the meaning of that Act. The effect of s. 12, sub-s. 7, cannot be considered on this appeal. Therefore the appellant cannot be considered the landlord; and consequently the respondent's dwelling-house has not become decontrolled.

Secondly, when different parts of a building are let separately as separate dwelling-houses, each of those parts, if the rent is within the statutory limits, is "a dwelling-house to which the principal Act applies," within the meaning of s. 2, sub-s. 1, of the Act of 1923: *Dunbar* v. *Smith*. (3) Therefore the two rooms let to the respondent in 1926 constitute a separate dwelling-house. The appellant, assuming she was ever the "landlord" of this dwelling-house, was not in possession of it on July 31, 1923, because it did not exist

(1) See headnote. (2) [1926] 1 K. B. 460.
(3) [1926] 1 K. B. 360.

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as a separate dwelling-house until August 28, 1926. She has never come into possession of that dwelling-house since that date. There were in the history of this case two dwelling-houses, one consisting of three rooms and the other consisting of two rooms. Each of them must go through the same process before both are decontrolled; each must be let as a separate dwelling-house, and then the landlord of each must come into possession of each, and the possession must be an actual and not merely a notional possession: *Hall* v. *Rogers*. (1)

Thirdly, the Act of 1920 cannot "cease to apply" to a dwelling-house to which it has never applied. There is a difference between a provision that an Act "shall not apply," which is the expression used in the proviso to s. 12, sub-s. 2, of the Act of 1920, and a provision that an Act shall "cease to apply," which is the expression used in s. 2, sub-s. 1, of the Act of 1923.

Montgomery K.C. in reply.

Cur. adv. vult.

GOUDGE *v.* BROUGHTON.

Appeal from the judgment of a Divisional Court reversing the judgment of the deputy judge of the Redhill County Court.

The plaintiff in October, 1925, bought from a former owner a cottage called Underbeeches Stables. The cottage had never been let before that time. When the plaintiff bought it he found in it the gardener of the previous owner. The gardener stayed on in the cottage paying no rent. In December, 1926, the plaintiff let the cottage to the defendant, Mrs. Broughton, at a rent of 3*l.* 10*s.* a month, and soon afterwards got rid of the gardener. On November 5, 1927, the plaintiff gave the defendant notice to quit, at the expiry of which, the defendant refusing to quit, the plaintiff brought an action of ejectment in the Redhill County Court.

The deputy county court judge treated the plaintiff as having come into possession of the cottage when he bought

(1) (1925) 133 L. T. 44.

it in October, 1925, and apparently considered the gardener as a mere licensee, whose possession, if any, was the possession of the plaintiff. He held that the plaintiff was a "landlord" who came into possession after the passing of the Act of 1923, and therefore that the Act of 1920 never applied to the cottage. Accordingly he gave judgment for the plaintiff. The Divisional Court (Salter and Talbot JJ.) held that they were bound by *Cohen* v. *Gold* (1) to decide that the plaintiff was not a landlord who was in possession at the passing of the Act of 1923 or came into possession after that Act, because the premises were never let until after the Act was passed. They therefore reversed the judgment of the county court.

The plaintiff appealed.

Croom-Johnson K.C. and *Horace Douglas* for the appellant. The presence of the gardener may be ignored. There was evidence on which the county court judge could find that he was a mere licensee who paid nothing for the permission to be in the house: *Remon* v. *City of London Real Property Co.* (2); *Braby & Co.* v. *Bedwell.* (3) It may therefore be taken that the appellant came in October, 1925, into possession of the cottage. Moreover he came into possession as owner; there was no long lease in this case and no question arises upon s. 12, sub-s. 7, of the Act of 1920. The house had never been let. In December, 1926, the plaintiff let it for the first time. The question is whether he is the landlord within the meaning of s. 2, sub-s. 1, of the Act of 1923. It is submitted that he was, and that he came into possession of the whole of the dwelling-house at the passing of that Act. The Divisional Court, following *Cohen* v. *Gold* (1), has held that there cannot be a landlord without a tenant and that therefore the appellant, who never had a tenant until 1926, could not be a landlord on July 31, 1923, the date of the passing of the Act of 1923, and never came into possession as landlord after that date; and therefore that the Act of 1920 applied to the house. *Cohen* v. *Gold* (1) was wrongly

(1) [1927] 1 K. B. 865. (2) [1921] 1 K. B. 49.
(3) [1926] 1 K. B. 456.

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decided and ought to be overruled. If there can be no landlord without a tenant, then there can never be a landlord who, in the words of s. 2, sub-s. 1, "is in possession of the whole of a dwelling-house," for his tenant, and not he himself, is in possession. The word "landlord" must therefore be loosely used as meaning, or at any rate so as to include "owner": *Brookes* v. *Liffen*. (1) It is submitted that "landlord" means the person who stands in that relation to the tenant at the time when a claim for possession arises or an application for apportionment of rent is made or an action for wrongful distress is brought by a statutory tenant, or when some other proceeding under the Rent Restriction Acts is instituted.

W. N. Stable for the respondent. In order that a dwelling-house may become decontrolled, or, to put it more accurately, in order that the Act of 1920 should cease to apply to a dwelling-house, it is necessary either that it should have been let before July 31, 1923, and that either the landlord should have come into possession before that date and be in possession at that date, or that it should have been in the occupation of a tenant at that date and that the landlord should have come into possession after that date: *Cohen* v. *Gold* (2); *Lloyd* v. *Cook*. (3) The cottage in the present case had never been let before July 31, 1923, nor was it on that date either in the appellant's possession as landlord or in the occupation of a tenant.

Croom-Johnson K.C. in reply.

Cur. adv. vult.

SIMSON *v.* MIATT.

Appeal from a Divisional Court affirming the judgment of the Clerkenwell County Court.

One F. R. Miller held a long lease from the Ecclesiastical Commissioners of a house No. 106 Queen's Road, Finsbury Park, at a ground rent of 10*l.* a year. On September 29, 1919, Miller let the whole house to the plaintiff at a rent of

(1) [1928] 2 K. B. 347. (2) [1927] 1 K. B. 865.
(3) [1928] 2 K. B. 364.

60*l.* a year. The plaintiff then let to one Mitchell four rooms on the top floor and one room on the ground floor. In 1922 Mitchell gave up possession, leaving the plaintiff in possession of the whole house as tenant to Miller. In December, 1925, the plaintiff purchased from Miller the long lease. In April, 1926, he let three rooms to the defendant as a separate dwelling-house at 25*s.* a week. On September 27, 1927, the plaintiff gave the defendant notice to quit for non-payment of rent. On October 7 the defendant issued a summons in the Clerkenwell County Court to have the rent of the whole house apportioned in order to determine the standard rent of the three rooms. On October 24 the plaintiff brought this action claiming rent, possession, and mesne profits. The rateable value of the house was then 58*l.*

The county court judge heard the summons for possession first, and gave judgment for the defendant on the ground that the three rooms had never been let before as a separate dwelling-house.

On appeal the Divisional Court (Salter and Talbot JJ.), following *Lloyd* v. *Cook* (1), affirmed the county court judge

The plaintiff appealed.

W. Hanbury Aggs and *T. M. O'Callaghan* for the appellant. This case comes within s. 2, sub-s. 1, of the Act of 1923. On July 31, 1923, the title to this house was as follows: The freehold was in the Ecclesiastical Commissioners, Miller was a lessee at a ground rent of 10*l.* a year and the appellant was in occupation as tenant to Miller at a rent of 60*l.* a year, and was therefore a tenant within the protection of the Act of 1920. No one was then in possession as landlord. The appellant, when he purchased Miller's lease in 1925, came into possession; but not as tenant, because the rent in respect of his tenancy was less than two-thirds of the rateable value of the house, and by s. 12, sub-s. 7, of the Act of 1920 that Act is to apply to the house as if no such tenancy existed. This distinguishes the present case from *Catto* v. *Curry* (2) and *Doulin* v. *Parcell* (3), in each of which there was a

(1) [1928] 2 K. B. 364. (2) [1926] 1 K. B. 460.
(3) 136 L. T. 633.

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sub-lessee whose position was expressly saved by the proviso to s. 2, sub-s. 1, of the Act of 1923. (1) In order that the proviso may apply there must be three persons in contemplation, a landlord, a tenant, and a sub-tenant. In the present case there are only two, the appellant, who is the landlord within the meaning of the Acts: *Jenkinson* v. *Wright* (2); *Finey* v. *Gougoltz* (3); and the respondent, who is the tenant; and there is no sub-tenant. The appellant came into possession in 1925 as landlord. The house then became decontrolled. He then let a dwelling-house to a tenant. That dwelling-house was decontrolled. No case has decided that a dwelling-house newly let since July 31, 1923, is within the Act of 1920. It is submitted that *Jenkinson* v. *Wright* (2); *Finey* v. *Gougoltz* (3), were rightly decided, and that this appeal should be allowed.

John Duncan for the respondent. Assuming that the ground rent was less than two-thirds of the rateable value, upon which point the evidence was not satisfactory, yet the appellant was not the landlord. *Finey* v. *Gougoltz* (3) was wrongly decided and has been doubted in *Brookes* v. *Liffen* (4); and *Jenkinson* v. *Wright* (2), which was followed in *Finey* v. *Gougoltz* (3), must stand or fall with the decision in that case. The "landlord" was not in possession of the three rooms on July 31, 1923, and has not come into possession of them since that date within the meaning of s. 2, sub-s. 1, of the Act of 1923, and consequently the Act of 1920 still applies to them.

[*Phillips* v. *Hallahan* (5) and *Leslie & Co.* v. *Cumming* (6) were also cited.]

(1) "Provided that where part of a dwelling-house to which the principal Act applies is lawfully sub-let, and the part so sub-let is also a dwelling-house to which the principal Act applies, the principal Act shall not cease to apply to the part so sub-let by reason of the tenant being in or coming into possession of that part, and, if the landlord is in, or comes into, possession of, any part not so sub-let, the principal Act shall cease to apply to that part, notwithstanding that a sub-tenant continues in, or retains, possession of any other part by virtue of the principal Act: . . . ."

(2) [1924] 2 K. B. 645.
(3) [1926] 2 K. B. 322.
(4) [1928] 2 K. B. 347.
(5) [1925] 1 K. B. 756.
(6) [1926] 2 K. B. 417.

W. Hanbury Aggs in reply. *Brookes* v. *Liffen* (1) may be supported, but not on the grounds on which it stands at present. The house in that case was let on a long lease at a ground rent which was less than two-thirds of its rateable value. The Act of 1920 therefore applied as if that tenancy had never existed. The net rateable value of the house was 38*l*. Therefore the house was within the Act of 1920. The quarterly tenancy on June 24 was the first letting and the rent, 26*l*., on that letting was the standard rent. Neither on July 31, 1923, nor afterwards were the landlords in possession, and therefore the house was not decontrolled.

Cur. adv. vult.

BARTRAM *v.* BROWN AND OTHERS.

Appeal from the Clerkenwell County Court.

On June 16, 1921, one Pitts, the owner of No. 32 Stroud Green Road, Finsbury Park, consisting of a shop and living rooms above it, made a lease thereof to one Hunter for a term of twenty-four years commencing on December 25, 1920, at a progressive rent of 70*l*., rising to 80*l*. a year. The net rateable value of the house was 59*l*. On July 18, 1921, Hunter assigned the residue of the term to Robinson and Fox. After a mesne assignment, on March 6, 1922, the lease was assigned to Cecil Brown, since deceased, and his wife, who then together went into occupation of the premises and used them for a butcher's business, but no one except the manager of the shop lived or slept there. On May 25, 1923, Mr. and Mrs. Brown sub-let the whole premises to one Griss for a term of twenty-two years from the previous March 25 on condition that he should not sub-let without their consent. Griss occupied the premises both as business premises and as a dwelling-house. Soon afterwards, without asking for or obtaining the consent of his lessors, he sub-let two rooms on the top floor to a Mrs. Simpson. Griss paid no rent at all; he occupied the premises for about three months, and then abandoned possession, leaving Mrs. Simpson in occupation of the two rooms on the top floor, where she was found by

(1) [1928] 2 K. B. 347.

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Mr. and Mrs. Brown after the departure of Griss. They took no effective steps to remove her, but for several months received rent from her. In October, 1923, they sub-let the whole premises to one Redman for twenty-one years and one quarter from a date in September, 1923, at a progressive rent rising from 150*l.* to 160*l.* a year. Redman recognized Mrs. Simpson as his tenant, and remained in possession under the sub-lease until early in 1926, and then he abandoned possession.

On June 14, 1926, Mr. and Mrs. Brown sublet the whole premises, including the two rooms on the top floor, which were still occupied by Mrs. Simpson, to the plaintiff on a yearly tenancy at a weekly rent of 3*l.* 1*s.* 7*d.* The plaintiff fell into arrear with his rent. On August 16, 1927, Cecil Brown levied a distress without applying for or obtaining the leave of the county court, which was necessary under s. 6 of the Act of 1920, if that Act still applied to the premises. Thereupon the plaintiff brought this action for illegal distress against C. Brown and the firm of brokers who distrained. The defendants contended that the Act of 1920 had ceased to apply to the premises on the grounds (1.) that Mr. and Mrs. Brown had come into possession of the whole of the dwelling-house since July 31, 1923—namely, in September, 1923, after Griss had left the premises, within the meaning of s. 2, sub-s. 1, of the Act of 1923; (2.) that within the meaning of s. 2, sub-s. 2, of that Act (1) they had granted to a "tenant"—namely, Redman—a lease of the dwelling-house for a term of not less than two years ending at a date after June 24, 1926, the date as in October, 1923, fixed for the expiration of the Act of 1920: see s. 2, sub-s. 2, of the Act of 1923, as amended by s. 1, sub-s. 3 (*b*), of the Rent and Mortgage Interest (Restrictions Continuation) Act, 1925.

The point raised in *Simson* v. *Miatt* (2), namely, that the freeholder, Pitts, was the landlord, was not taken in the county court.

The county court judge held that Mr. and Mrs. Brown had not come into actual possession of the premises in

(1) See headnote. (2) Ante, p. 110.

September, 1923, within the meaning of s. 2, sub-ss. 1 and 3, of the Act of 1923, and that no lease had been made to "the tenant" but to a stranger, Redman, and therefore the case did not fall within s. 2, sub-s. 2, of that Act. He accordingly gave judgment for the plaintiff for 35*l.*, the agreed amount of damages in case of liability. On appeal the Divisional Court (Acton and Finlay JJ.) affirmed the county court judge.

The defendants appealed.

The argument was chiefly upon the inference to be drawn from the complicated facts. The Court held that the defendants had never been in actual possession at the time when the distress was levied, and consequently that if the Act of 1920 ceased to apply to the house it must be by virtue of s. 2, sub-s. 2, and not by s. 2, sub-s. 1, of the Act of 1923. The question then arose whether the appellants had granted to "the tenant" a valid lease, as described in sub-s. 2.

Croom-Johnson K.C. and *J. H. Critchley*, for the appellants, contended that the words "the tenant" referred to the person to whom the lease mentioned in s. 2, sub-s. 2, was granted, that is to say, in the present case, Redman.

Quass, for the respondent, contended that "the tenant" must mean one who was already in occupation as tenant when the lease was granted; the sitting tenant, as he was called. It was clearly the intention of the Legislature that he should still have protection, if he desired it. He still had this advantage if he was "the tenant" referred to in sub-s. 2, for he need not accept the lease there indicated unless it suited him. But if "the tenant" meant any one else the landlord might decontrol the dwelling-house against the will of the sitting tenant and leave him without any protection.

Cur. adv. vult.

BARKER *v.* HUTSON.

Appeal from the decision of a Divisional Court affirming the judgment of the Brentford County Court.

The plaintiff claimed possession of a dwelling-house consisting of two rooms in a house, No. 3 Oxford Road, Ealing.

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There was a cross-summons by the defendant for apportionment of the rent of the house in order to determine the standard rent of the two rooms.

The facts were as follows. On December 25, 1926, the freeholders of the house, being then in actual possession of it, granted to the plaintiff a lease of the house for two years. On May 4, 1927, the plaintiff let the two rooms in question to the defendants at a weekly rent of 17*s.* 6*d.* The plaintiff subsequently gave the defendant notice to quit.

The defendant refused to give up possession. The plaintiff then brought the action in the county court. The defendant contended that the two rooms were a dwelling-house to which the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applied, and claimed apportionment of the rent of the whole house as aforesaid.

The county court judge, following *Cohen* v. *Gold* (1) and *Lloyd* v. *Cook* (2), held that as the two rooms had never been let as a dwelling-house before May, 1927, no one as landlord of them had been in possession of them on July 31, 1923, or had come into possession of them since that date, and that therefore the Rent and Mortgage Interest Restrictions Act, 1923, did not apply, and that the rooms were still within the protection of the Act of 1920. He therefore dismissed the action and made an order for apportionment of the rent of the house. On appeal the Divisional Court (Salter and Talbot JJ.) affirmed the county court judge.

The plaintiff appealed.

Humphrey Edmunds for the appellant.

John Duncan for the respondent.

The points in this case are covered by the arguments in *Lloyd* v. *Cook* (3) and *Goudge* v. *Broughton*. (4)

Cur. adv. vult.

July 17. The following written judgments were delivered :—

SCRUTTON L.J. This group of appeals was heard together on account of difficulties which had arisen from contradictory

(1) [1927] 1 K. B. 865.
(2) [1928] 2 K. B. 364.
(3) Ante, p. 105.
(4) Ante, p. 108.

decisions of the Divisional Courts as to the true meaning of the decontrolling section, s. 2 of the Rent Restriction Act of 1923. The material words of that section are as follows: "2.—(1.) Where the landlord of a dwelling-house to which the principal Act applies is in possession of the whole of the dwelling-house at the passing of this Act, or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house."

The chief conflict giving rise to these appeals is between the decisions of *Cohen* v. *Gold* (1) and *Lloyd* v. *Cook* (2) on the one hand, and *Ratkinsky* v. *Jacobs* (3) on the other, upon the meaning of this section.

In *Cohen* v. *Gold* (1) the plaintiff, when the 1923 Act passed, was in possession of the whole of a house, which he had never let. In 1925 he let three rooms on the ground floor to Gold. He alleged in the action that his actual possession from the passing of the Act of 1923 to the letting in 1925 had caused the Rent Restriction Act to cease to apply to the three rooms or the whole house, and therefore that he could eject Gold. The Divisional Court (Acton and Talbot JJ.) decided against the plaintiff, affirming the county court judge. I understand the decision proceeded on two grounds: (1.) that "the landlord" could not be in possession or come into possession of premises which had never been let; where there was no tenancy, there was no "landlord"; (2.) that being in possession of the whole house did not involve being in possession of a part of the house, subsequently let as a dwelling-house. The point that the occupier of the house being in fact the assignee of a lease with twenty-six years to run was a tenant, and not the owner, and could not be within the meaning of the section "the landlord," does not appear to have been taken in the county court, or to form the ground of the decision.

(1) [1927] 1 K. B. 865. (2) [1928] 2 K. B. 364.
(3) 138 L. T. 739; since reported p. 24 above.

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In *Lloyd* v. *Cook* (1), which is one of the present group of appeals, the claim was by the sub-tenant, Lloyd, to apportion the standard rent of the whole house in order to determine the proper rent to be paid by him to his "landlord," Mrs. Cook, for two rooms which he occupied. Mrs. Cook replied that the two rooms and the whole house had been decontrolled. She was the holder of a ninety-nine years' lease and occupier of the whole house. She had let three rooms to one Churchman. On August 12, 1926, Churchman vacated possession. Mrs. Cook went in; prepared one room for the reception of her son, who at once occupied it; and on August 28, 1926, let the two remaining rooms to Lloyd. Mrs. Cook contended that she had come into actual possession of the two rooms, which were therefore decontrolled. The Divisional Court (Salter and Charles JJ.) decided against the contention, reversing the county court judge, who had held that the rooms were decontrolled. The points that the rooms were not decontrolled by reason of the proviso to s. 2, sub-s. 1, of the Act of 1923, and the effect of s. 12, sub-s. 7, of the Act of 1920 in enabling the Court to disregard long leases at a ground rent, were not taken in the county court, and could not be taken against the county court decision in the High Court: see *Smith* v. *Baker* (2), a decision repeatedly acted on in the Court of Appeal. The Divisional Court took the view that though the dwelling-house composed of three rooms had been decontrolled, Mrs. Cook having come into possession of it after it had been let, the dwelling-house of two rooms, which as such had never been previously let, had never been in or come into Mrs. Cook's possession as landlord, following *Cohen* v. *Gold.* (3) The points that Mrs. Cook being tenant was not landlord within the meaning of the section, and as to the effect of s. 12, sub-s. 7, of the Act of 1920, were never taken or decided.

On the other hand in *Ratkinsky* v. *Jacobs* (4), Barnet Ratkinsky, the father, had bought a house in 1917, and had let four rooms to a Mr. Cohen, who vacated possession in

(1) [1928] 2 K. B. 364.
(2) [1891] A. C. 325, 333, 349, 358.
(3) [1927] 1 K. B. 865.
(4) 138 L. T. 739; since reported p. 24 above.

February, 1926. Barnet Ratkinsky, being then in possession of the whole house, let four rooms, three of Cohen's letting, and one other, to Jacobs. In February, 1927, Barnet Ratkinsky sold the whole house to his son Morris, who in November, 1927, gave notice to Jacobs to quit and claimed possession. Jacobs replied that he was protected by the Rent Restriction Acts, and his counsel relied on *Cohen* v. *Gold* (1) and *Lloyd* v. *Cook*. (2) The Court, composed of Branson and MacKinnon JJ., declined to follow the cases cited. They held that "landlord" meant "owner"; that an owner might be in actual possession though he had never previously let; and that, as the owner had been in possession of the four rooms let to Jacobs after the passing of the Act of 1923, they were decontrolled. In this case it will be noted that the Ratkinskys were owners, not themselves tenants.

These two lines of decision cannot stand together; one side or the other must be wrong. I look at the object and words of s. 2 of the Act of 1923 to ascertain its true construction. I take its object to be, at a time when rent restriction was supposed to be drawing to an end owing to increased provision of houses, gradually to decontrol in cases where existing vested interests had come to an end by the owner's or landlord's having or obtaining vacant possession on or after July, 1923, but not to allow a tenant to obtain freedom to profiteer by sub-letting, while his landlord was bound to him by the Acts. By reason of the proviso to s. 2, sub-s. 1, it could not be argued that the tenant by coming into possession of the part which he had sub-let obtained freedom from control, while his landlord was controlled; the landlord could get freedom from control of the part of which he came into actual possession, though he was controlled as to the part in possession of the sub-tenant. This was carrying out the policy of s. 5, sub-s. 5, and s. 15, sub-s. 3, of the Act of 1920.

Turning to the actual words, the substantive part of s. 2, sub-s. 1, of the Act of 1923, only uses the word "landlord"; it does not speak of tenant, or sub-tenant. It speaks of the

(1) [1927] 1 K. B. 865. (2) [1928] 2 K. B. 364.

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"whole of" a "dwelling-house," and frees the whole of the dwelling-house under certain conditions from the application of the principal Act. The first of those conditions is if the "landlord" is at the passing of the Act in actual possession of the whole of the dwelling-house. He cannot be, if at that date he has a tenant. If he has then no tenant, he is not stricto sensu a "landlord." This seems to me conclusive to show that the term "landlord" cannot be used as requiring a contract of tenancy. To hold otherwise would be to prevent any person from being in actual possession at the passing of the Act, so as to decontrol the house, for if he were then a "landlord" in the strict sense his tenant would be in possession. The word "landlord" must be used either in the looser meaning of "owner," or in the still looser meaning of a person who at a later stage is going to appear as a landlord contesting with a tenant the terms of his tenancy. Indeed that "landlord" means "owner" is the view of Salter J. in *Brookes* v. *Liffen* (1), adopted by Sankey L.J. in the same case in this Court. (2) But if "landlord" means "owner," it seems to me impossible to support the view that the section cannot apply unless the house is or has been previously let, which is the fundamental ground for the decisions in *Cohen* v. *Gold* (3) and *Lloyd* v. *Cook*. (4) If the owner on or after July 31, 1923, is in or comes into actual possession of the whole house there are no vested interests to prevent decontrol; similarly if he comes into actual possession of a dwelling-house, which is part of another dwelling-house, the first or smaller dwelling-house may be decontrolled.

It is further to be noted that the effect of the "landlord's" coming into possession of the whole dwelling-house is that "the principal Act shall cease to apply to the dwelling-house." Now, apart from the effect of s. 12, sub-s. 7, of the Act of 1920, which must be considered separately, this renders it very difficult to contend that a tenant can be a landlord or owner. Suppose the tenant sub-lets his whole tenement and then comes into actual possession of it again, if as between

(1) [1928] 1 K. B. 441.
(2) [1928] 2 K. B. 347.
(3) [1927] 1 K. B. 865.
(4) [1928] 2 K. B. 364.

himself and any sub-tenant the house is decontrolled, is the house decontrolled as between the tenant and his landlord, so that the landlord can distrain without leave of the Court, or get possession at the end of the tenant's contractual tenancy? It is difficult to see why it should follow from the tenant's getting actual possession against his sub-tenant, that he should lose the protection of the Acts against his landlord. But if he does not, then the Acts have not "ceased to apply to the dwelling-house." In the case of the tenant's sub-letting part, the proviso to s. 2, sub-s. 1, makes it clear that Parliament did not intend that the tenant recovering actual possession should free himself and the part of the house from the Acts. It may be said that the insertion of the proviso involves that but for the proviso the tenant would be a landlord within the first part of the section. But it is not uncommon to insert a proviso to prevent the main enactment being construed as having a meaning which it does not bear. It will be noted that in the proviso "landlord" certainly means "owner" or "freeholder" as distinguished from "tenant"; it will be curious, if in the first part of the section it has a different meaning, and includes "tenant." I have come to the conclusion, after careful consideration of the object and language of the section, that "landlord" means owner or freeholder, and, subject to consideration of s. 12, sub-s. 7, of the Act of 1920, does not include a tenant from a freeholder. I test the question in this way. Suppose that the day after the passing of the Act of 1923, two persons came before a judge to ascertain their respective positions in regard to houses which were by reason of their rateable value within the Rent Restrictions Acts. The first was a freeholder, who said: "I have always been in actual possession of this house, which has never been let. Is it now decontrolled?" The answer would I think be: "Yes; it is true you are not strictly a landlord, as there is no tenant, but if this is the meaning of 'landlord' no landlord would ever be in actual possession at the passing of the Act; possession would always be in the tenant. Landlord must mean owner who can let." The second

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applicant said: "I have a three years' lease from the freeholder, and am in actual possession; I can sub-let the whole of the premises. Am I a 'landlord' in actual possession so that the premises are decontrolled?" The answer should in my opinion be "No; you are in actual possession, but as a tenant, not as a landlord; so long as you are a tenant you cannot get decontrol." I do not find the definitions of "landlord" in s. 12 of the 1920 Act, present any difficulty. Sub-s. 1 (*g*) of that section expressly excludes the tenant from those persons who may be "landlords" because they are entitled to possession, and would include an owner who has not let but is in possession. When sub-s. 1 (*f*) makes "landlord" include a person deriving title under the original landlord, I do not think it can contemplate there being at the same time two landlords, one the landlord, the other the tenant. The person who derives title under the original landlord takes his place; the original "landlord" ceases to be the landlord. I am the more persuaded that the term "landlord" must be restricted to "owner," because I do not see how else the Acts can "cease to apply to the dwelling-house." If they still apply as between owner and tenant, they do not "cease to apply." When Parliament wanted the Acts to cease to apply to a particular rent or tenancy, they knew how to say so: see s. 12, sub-s. 7, of the Act of 1920, in which sub-section the Acts continue to apply to the whole dwelling-house. It is also to be noted that to construe "landlord" as "a tenant who has or may let," would in some cases have no effect, in other cases an effect contrary to the policy of the Act. If the tenant, whether statutory or contractual, sub-lets part of his tenement, by the operation of the proviso to s. 2, sub-s. 1, of the Act of 1923 the part is not decontrolled by the landlord-tenant coming into actual possession of the part so let. If the statutory tenant assigns or sub-lets the whole of his tenement, the landlord under s. 5, sub-s. 1 (*h*), of the Act of 1920 can turn him out, and there will be no question of actual possession reverting to the tenant. If a contractual tenant or a statutory tenant with consent lawfully sub-lets the whole, and if he is a

"landlord" within s. 2 of the Act of 1923, this consequence follows: before he sub-lets he is in actual possession, and if he is a "landlord" the premises are decontrolled, and he loses his protection against his landlord, which I cannot believe to be the intention of Parliament.

There remains the question of the meaning of s. 12, sub-s. 7, of the Act of 1920. As I have stated in *Brookes* v. *Liffen* (1), I have no doubt of the original object of this sub-section. It was (1.) to prevent a long lease at a small ground rent from hampering the landlord in charging a proper rent, or perhaps from evicting the tenant, at the end of the lease; (2.) to prevent compassionate tenancies granted at a low rent during the war from having a lasting effect against the charitable landlord. But the suggestion was made that the effect of the Courts having to treat such tenancies as non-existing was to prevent them from seeing that there was an owner other than the tenant, and to compel them always to treat the tenant as owner. In *Brookes* v. *Liffen* (2) this argument was carried to an ingenious extreme. Brookes was the freeholder; Liffen, his tenant, had in 1904 twenty years to run of a long lease at a low ground rent. This lease terminated in June, 1924, and Liffen was immediately granted a quarterly tenancy at a rack rent. In November, 1926, Brookes gave the tenant notice to quit, alleging that, as the Courts could not treat the long lease as existing, Liffen had been in actual possession after 1923, and therefore the Acts ceased to apply to his dwelling-house. The county court judge, the Divisional Court, and the Court of Appeal declined to accept this argument. The Court was not bound to shut its eyes to the fact that at the time when there was a quarterly tenancy by a freeholder to a tenant there was then an owner of the house, and Liffen, though a "person entitled to possession" under s. 12, sub-s. 1 (*g*), was not "a person other than the tenant." Further, sub-s. 7 expressly said that the Act was to continue to apply to the house; the owner could not therefore say it did not apply. Another way of stating the point decided was that, if the

(1) [1928] 2 K. B. 347, 349. (2) [1928] 2 K. B. 347.

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Court was unable to look at the facts while the long lease was in existence, when at the end of that lease they could look at the facts they found Liffen a quarterly tenant, and Brookes a landlord who had never been in actual possession. The Act of 1923 therefore gave Brookes nothing, while the Act of 1920 said the Acts were to continue to apply to the house.

Some trouble is caused by the cases of *Finey* v. *Gougoltz* (1) and *Jenkinson* v. *Wright*. (2) In the latter case Mrs. Jenkinson in 1920 acquired an unexpired term of thirty-one years in a ninety-nine years' lease. In 1921 she mortgaged her leasehold interest by sub-demise to the mortgagee to whom she attorned tenant at a nominal rent of a peppercorn. She lived in the house and let part of it after 1923. She gave her sub-tenant notice to quit, alleging that she had actual possession after 1923, and he replied that the tenancy under the mortgage could not be looked at under s. 12, sub-s. 7, of the Act of 1920, and that the proviso to s. 2, sub-s. 1, of the Act of 1923 protected him. The county court judge held that plaintiff was tenant, and therefore that the proviso applied, and the house was still subject to the Acts. The judges in the Divisional Court allowed the appeal, but upon different grounds. Darling J. held that a tenant with a substantial part of a lease unexpired was a "landlord" for the purposes of s. 2 of the Act of 1923, apparently quite independently of the question of the relation of rent to rateable value under s. 12, sub-s. 7, of the Act of 1920. This seems to me with respect to be legislation, not construction. Long leases at a rack rent do not take a house out of the Act. He further held that though the mortgage made the "landlord" a tenant, the tenancy might be disregarded under sub-s. 7 and the landlord-tenant was therefore in actual possession and the Acts did not apply. This, although sub-s. 7 said the Acts should apply, and only the tenancy be disregarded. Rowlatt J. did not express any opinion on the first point; agreed that sub-s. 7 struck out the mortgage tenancy, but pointed out that the point as to the

(1) [1926] 2 K. B. 322. (2) [1924] 2 K. B. 645.

proviso to s. 2, sub-s. 1, was not taken in the county court and therefore could not be considered.

So far as it rested on the view of Darling J. that any tenant under a long lease, whether within s. 12, sub-s. 7, or not, was a landlord, in my view this case was wrongly decided. If the other points had been taken in the county court, it appears to me, for the reasons stated hereafter, that Mrs. Jenkinson was by the operation of sub-s. 7 a landlord in actual possession of a tenement, decontrolled by s. 2, and therefore the subsequent letting did not make the proviso applicable.

In *Finey* v. *Gougoltz* (1) the defendant, Mrs. Gougoltz, was the lessee of a ninety-nine years' lease at a rent of 10*l*. In January, 1925, she was in possession of the whole of the house. In February, 1925, she let a room to Finey. As he did not pay his rent she distrained on him, without leave, and he brought an action for wrongful distress, and claimed apportionment. The county court judge held that Mrs. Gougoltz was not landlord but tenant, and that the premises were not decontrolled. The Divisional Court reversed this decision, holding that s. 12, sub-s. 7, of the Act of 1920 required them to treat the tenant as landlord, and that s. 2 of the Act of 1923 decontrolled the house, there not being three persons, landlord, tenant and sub-tenant, under the proviso. They thus not only ignored the rent and tenancy, but ignored the real owner, and ignored the concluding words of s. 12, sub-s. 7, of the earlier Act, that the Act should apply to the dwelling-house. For the reasons given below I think this case was rightly decided.

I do not pretend that it is easy to construe s. 12, sub-s. 7, of the Act of 1920 and s. 2 of the Act of 1923. I have had great doubt what is the position when, at or after the passing of the Act of 1923, a lessee is in actual possession of a dwelling-house under an unexpired portion of a long lease at a rent less than two-thirds of the rateable value of the tenement. But I appreciate that to hold that the freeholder at such a time is to be considered by the Court as owner and landlord

(1) [1926] 2 K. B. 322.

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will be to prevent a very large number of dwelling-houses in London, where there are many long leases at ground rents, from being decontrolled. And, although with considerable hesitation, I have come to the conclusion that the Court, which is to disregard the rent and tenancy, may under s. 2 of the Act of 1923 treat the tenant under such a lease as the landlord and, if he is or has been on or since the passing of the Act of 1923 in actual possession, may treat the premises as decontrolled. In other words that in such a case the part of s. 12, sub-s. 7, of the Act of 1920 which provides that the Acts are to continue to apply to the dwelling-house is to be treated as repealed by s. 2 of the Act of 1923. I have come to the conclusion that the true construction of s. 12, sub-s. 7, of the Act of 1920 and s. 2 of the Act of 1923 is as follows :—

1. Where a long lease coming within the terms of sub-s. 7 expires after July, 1923, and the landlord goes into actual possession before he grants a new tenancy, there seems to be no difficulty. The house becomes decontrolled under s. 2.

2. Where, when such a long lease expires, the landlord has arranged for a tenancy to follow immediately, *Brookes* v. *Liffen* (1), by which we are bound, decides that, the landlord not being in actual possession, s. 2 does not apply and the house is not decontrolled.

3. Where such a long lease has not expired, s. 12, sub-s. 7, of the Act of 1920 with s. 2 of the Act of 1923 requires the Court to ignore the fact that there is an owner, not the tenant, and an owner who is not in actual possession. Sect. 12, sub-s. 7, of the earlier Act says the Act is to apply in respect of the house, but s. 2 of the later Act enables the Court to overlook the owner and turn the tenant into a landlord-owner, thus depriving the tenant of any protection or restriction he would get from the Acts. If the tenant under a lease within s. 12, sub-s. 7, is in actual possession of the whole house at the passing of the Act of 1923, or comes into possession of the whole house, he can be treated as landlord, and the premises will be decontrolled under s. 2, sub-s. 1, of the Act of 1923. It is immaterial if after that he lets

(1) [1928] 2 K. B. 347.

part and resumes actual possession of that part. The proviso does not apply, for the premises are already decontrolled. If at the time of the passing of the Act he has sub-let part of the premises and comes into actual possession of that part, the part is decontrolled, for as landlord he has resumed possession of the part, and decontrol follows from the last words of the proviso. I doubt whether the draftsman or Parliament ever gave the relation between the two sections a thought, but in my opinion the above is the result of their labours.

I have come to the conclusions :—

1. That in so far as they rest on the view that there cannot be a landlord under s. 2, unless the exact dwelling-house, the subject of the dispute, has been previously let, and that it is immaterial that a large dwelling-house containing the dwelling-house in question has been previously let or has returned to the actual possession of the owner, *Cohen* v. *Gold* (1) and *Lloyd* v. *Cook* (2) are wrongly decided, and that *Ratkinsky* v. *Jacobs* (3) is rightly decided.

2. That "landlord" in s. 2 means owner or freeholder, and that apart from sub-s. 7 actual possession by a tenant either of the whole or part of a dwelling-house cannot decontrol the house, either under the principal clause or the proviso. It is possession by a tenant, not by a landlord.

3. That the general operation of sub-s. 7 and s. 2 may, during the currency of a lease within sub-s. 7, under s. 2 turn a tenant into an owner, so as to decontrol a house under s. 2 to which sub-s. 7 had said the Acts were to apply. I have above stated the detailed application of the sub-section and section.

4. As to other cases, this Court is of course bound by *Prout* v. *Hunter* (4) and *Brookes* v. *Liffen*. (5) The following cases were correctly decided : *Dunbar* v. *Smith* (6) ; *Catto* v. *Curry* (7) ; *Joy* v. *Eppner* (8) ; and *Doulin* v. *Parcell*. (9)

(1) [1927] 1 K. B. 865.
(2) [1928] 2 K. B. 364.
(3) 138 L. T. 739 ; since reported p. 24 above.
(4) [1924] 2 K. B. 736.
(5) [1928] 2 K. B. 347.
(6) [1926] 1 K. B. 360.
(7) [1926] 1 K. B. 460.
(8) [1925] 1 K. B. 362.
(9) 136 L. T. 633.

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The following cases were wrongly decided: *Jenkinson* v. *Wright* (1), so far as it rests on the view of Darling J. that the tenant under any long lease is an owner, and in so far as it ignores the effect of the proviso to s. 2; and *Oakley* v. *Wilson*. (2)

LLOYD *v.* COOK.

This is one of the two cases, the conflict of which with *Ratkinsky* v. *Jacobs* (3) resulted in the hearing of this group of cases.

Mrs. Cook in 1913 purchased as tenant the remaining period of a long lease of ninety-nine years. She let three rooms, part of the demised premises, to Churchman, who gave up possession on August 14, 1926. She then came into actual possession of those three rooms and at once prepared one for her son, who came in and occupied, paying rent. On August 28 she let the other two rooms to Lloyd, who presently applied for apportionment, to which Mrs. Cook replied that the rooms were decontrolled.

The county court judge held in Mrs. Cook's favour that the two rooms were decontrolled, Mrs. Cook having been in actual possession between August 14 and August 28. This is his contemporary note. In signing a note on March 8, 1928, he added that Mrs. Cook was the "landlord" of the three rooms let to Churchman. The Divisional Court reversed this decision on the ground that the two rooms had never been let before as a separate dwelling, and therefore when first let were controlled by the Acts, supporting this decision by that in *Cohen* v. *Gold*. (4) Oddly enough Salter J. agrees that the three rooms were decontrolled as a separate dwelling, but holds that the two rooms, part of the three, were not. It must be noted that there is no trace in the notes or judgment of the county court judge that any point was taken as to the effect of the long lease under s. 12, sub-s. 7, of the 1920 Act; or as to the effect of the proviso to s. 2 of the 1923 Act, or, I think, as to the contention that though

(1) [1924] 2 K. B. 645.
(2) [1927] 2 K. B. 279.
(3) 138 L. T. 739: since reported p. 24 above.
(4) [1927] 1 K. B. 865.

Mrs. Cook might be the "landlord" of Churchman or Lloyd, she was not the landlord of the whole dwelling-house within the meaning of s. 2 of the Act of 1923. The decision of *Smith* v. *Baker* (1), already referred to, prevents our giving effect to our view on these points. Apart from these points I think the decision of the county court judge was right, and the decision of the Divisional Court erroneous. I think it is unnecessary that there should be a previous letting of these two rooms as a dwelling-house before a "landlord" could obtain actual control of them, and that it is immaterial that they had never been let either as part of a larger dwelling-house or at all. If they had never been let at all, the actual possession was the more complete. On the points which alone we can consider the appeal must be allowed, and the judgment of the county court judge restored with costs here and below. But I think it right to add that in our view of the construction of the statutes, if the points had been taken :—

1. Apart from the question of the long lease, the freeholder would be owner ; the proviso to s. 2 of the Act of 1923 would therefore apply, and neither the three, nor the two, rooms would be decontrolled.

2. If the long lease is considered, as I have already stated, in my opinion it prevents the Court from taking notice that there is an owner who was not in actual possession, and allows the Court to treat the tenant as landlord and ignore the owner.

If subsequent cases raise similar facts to *Lloyd* v. *Cook* and the first point above is taken, and there is no long lease, the rooms would not be decontrolled, though not for the reasons given by the Divisional Court, which were in my opinion erroneous.

GOUDGE *v.* BROUGHTON.

In this case Goudge, the plaintiff, bought a cottage called "Underbeeches Stables" in October, 1925. It had never previously been let. When he bought it he found in it the

(1) [1891] A. C. 325.

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gardener of the previous owner. This gardener is stated to have paid no rent. The gardener stayed in the cottage paying no rent till December, 1926, when the plaintiff let the cottage to the defendant, Mrs. Broughton, and "got rid of the gardener." Goudge gave Mrs. Broughton notice to quit, and brought an action for possession, and Mrs. Broughton pleaded the Rent Acts. The county court judge made an order for possession. To do so he must have found that Goudge before he let to Mrs. Broughton was in actual possession, through or in spite of the gardener, who was a licensee, tenant at will, or trespasser, and who anyhow was not there on terms that he paid rent; and that the cottage was therefore decontrolled. The Divisional Court reversed this on the ground taken in *Cohen* v. *Gold* (1) that the plaintiff could not be a "landlord" who had obtained actual possession, for if he did so obtain possession, it was when the cottage had never been let, and therefore he could not be a "landlord." Holding this, the Court did not decide the point about the gardener, though I think the judgment of Salter J. shows he would either have held Goudge to have possession through the gardener, or the finding of the county court judge to be one of fact with which he could not interfere.

I take the same view of this point. I think there was evidence on which the judge could find that the owner was in actual possession through the tenant at will or licensee. In *Remon's* case (2) I said, and I think it has been accepted, that the decision as to statutory tenants only applies to cases where there was a previous legal letting and legal tenancy and does not extend to caretakers, occupiers by service, and mere trespassers.

I should have made the same finding as the judge. That being so, Goudge was in actual possession after the passing of the Act of 1923, and the premises became decontrolled, for in my view it was not necessary that they should have been previously let to make the plaintiff a "landlord" within the meaning of the Act, which is the decision in *Cohen* v. *Gold* (1) on which the Divisional Court proceeded. I think

(1) [1927] 1 K. B. 865. (2) [1921] 1 K. B. 49, 59.

that decision and the decision in the present case cannot stand. The appeal must be allowed, and the judgment of the county court restored with costs here and below.

SIMSON *v.* MIATT.

In this case one Miller was a tenant of a dwelling-house under a long lease at 10*l.* a year, and in 1919 he let the house to Simson at 60*l.* a year. During his tenancy Simson let four rooms on the top floor and a room on the ground floor to Mitchell. In 1922 Mitchell went out and Simson, as tenant to Miller, was in possession of the whole house. In December, 1925, Simson purchased from Miller the unexpired portion of the lease, being then in possession of the whole house as tenant under the long lease. In April, 1926, Simson let to Miatt three out of the four rooms on the top floor. Miatt did not pay his rent. Simson therefore took out a summons for possession. Miatt replied with a summons for apportionment. The county court judge in a careful judgment held that Simson was always a tenant and never a "landlord," and that the premises were not, therefore, decontrolled. It is, I think, clear that the point under s. 12, sub-s. 7, of the Act of 1920 was taken before him, for he talks of Miller as a lessee at a ground rent having no landlord, and Simson having no landlord after the assignment in 1925. But it follows in my view that Simson was then a landlord in actual possession by virtue of sub-s. 7, and that the house was therefore decontrolled. The Divisional Court, without expressing any opinion on this point, held, following *Lloyd* v. *Cook* (1), that as the three rooms let to Miatt had never been let before, Simson did not come into possession of them as landlord. I have already held that *Lloyd* v. *Cook* (1) was wrongly decided. It follows that the reason of the Divisional Court for supporting the judgment was erroneous. But in my opinion the county court judge did not give the proper effect to the fact that Simson was tenant under a long lease at a ground rent which was less than two-thirds of the rateable value. He should have treated Simson after 1925 as a

(1) [1928] 2 K. B. 364.

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landlord in actual possession. Sect. 2 then decontrolled the premises and Miatt had no right to a summons for apportionment. The premises were decontrolled before he omitted to pay his rent, for the actual possession obtained by Simson in 1925 was not for non-payment of rent. The judgment of the county court was therefore erroneous, and the judgment of the Divisional Court supporting it was also based on erroneous reasons. The appeal must therefore be allowed, and judgment given for possession, and the summons for apportionment dismissed.

BARTRAM *v.* BROWN.

The facts in this case were very complicated. Brown, the landlord, was sued for levying a distress without the leave of the Court. He replied that the premises had become decontrolled: (1.) By his being in actual possession after July 31, 1923. (2.) By his having granted two long leases to one Griss, and one Redman, thus decontrolling the premises under s. 2, sub-s. 2, of the Act of 1923.

The county court judge held: (1.) That the landlord had never obtained actual possession; (2.) That under sub-s. 2, the lease must be granted to the "sitting tenant," a tenant then in actual possession, and not to a fresh tenant. The Divisional Court affirmed him in both points. I have come to the same conclusion. As to the point of actual possession, without going into the complicated facts, I cannot find a time after July, 1923, when Mr. and Mrs. Brown were in actual possession. A certain Mrs. Simpson remains in possession of some rooms during the whole period paying rent to various people, including the Browns. The Browns themselves had carried on a butcher's business there and withdrawn from it and never seem to have come near the place, except for a casual inspection. They granted long leases first to Griss and then to Redman, both of whom disappeared. Mrs. Simpson remained a tenant through all the changes in the history of the house. On the second point, I think the object of the sub-section was to allow the change from a tenant under the Acts to a tenant under contract, who had

as much contractual protection as he would get under the Acts to decontrol the house. If a long lease was being granted to a new tenant, decontrol could be effected under s. 2, sub-s. 1, by the landlord's entering into actual possession before he granted the new lease, without any need for sub-s. 2. If there were a sitting tenant, "the tenant," he could not be dealt with in this way, and sub-s. 2 was necessary. The whole aim of s. 2 in my opinion was to accelerate decontrol, if vested interests were extinguished or provided for. The appeal must be dismissed with costs.

BARKER *v.* HUTSON.

The facts of this case are simple. In 1926 the owners were in actual possession of a dwelling-house, 3 Oxford Road, Ealing, and on December 25, 1926, they let it to Barker, the present plaintiff and appellant. In May, 1927, Barker sub-let two rooms to Hutson, the present defendant and respondent. Barker gave Hutson notice to quit. Hutson replied that the rooms were under the Rent Restriction Acts, and asked for apportionment. The county court judge, following *Cohen* v. *Gold* (1), and finding that the two rooms had never been let as a separate dwelling-house before, decided in favour of the tenant. The Divisional Court, hearing the case after *Lloyd* v. *Cook* (2) had been decided, followed the two previous cases and dismissed the appeal. In my view, when the freeholders were in actual possession after July, 1923, the whole house became decontrolled. Control did not revive on the letting of the whole house to Barker, or the two rooms to Hutson. The appeal must be allowed; the judgment of the county court judge set aside, and an order made for possession and mesne profits at 17*s.* 6*d.* a week from November 21, 1927. The plaintiff must have the costs here and below. The order of the judge for apportionment cannot stand.

GREER L.J. It will be seen when I read my judgment that although I agree as to the result in all these five cases, I do not agree with my Lord with regard to the grounds on

(1) [1927] 1 K. B. 865. (2) [1928] 2 K. B. 364.

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which the decision is put, and unfortunately the grounds for the decision seem to me to be more important than the decision in each of these cases. Therefore I think it necessary to read a separate judgment.

In order to deal with the questions arising in these cases it is necessary to consider two questions arising on the construction of s. 2 of the Rent and Mortgage Interest Restrictions Act, 1923. The first question is whether when the Act has ceased to apply to the whole of a dwelling-house, it becomes re-applied to parts of the dwelling-house subsequently let which have never been the subject-matter of a separate letting before. The second question is whether a house can become decontrolled if the landlord of the tenant who is the occupying tenant at the time when the question arises is able to prove that he was in possession of the whole of the dwelling-house at the time of the passing of the Act of 1923 (July 31, 1923).

The first question involves a decision as to whether *Cohen* v. *Gold* (1), followed by *Lloyd* v. *Cook* (2), on the one hand, or *Ratkinsky* v. *Jacobs* (3), on the other hand, was rightly decided. On this question I have come to the conclusion that once the whole of a dwelling-house to which the Act applies has become decontrolled, the decontrol affects every part of the dwelling-house, whether such part has or has not been previously let. It has been decided by this Court that where the whole of a dwelling-house is let on August 3, 1914, that is a letting of every part of the dwelling-house, and a subsequent letting of part of the dwelling-house is not within the Act the first letting of that part: *Sutton* v. *Begley*. (4) For the purpose of deciding when the separate part was first let, the rule that the whole includes the part has thus been applied by the Court. I think that the same rule should equally apply when the question is whether the decontrol of the whole is a decontrol of all the parts. Since the decision in *Barrett* v. *Hardy Bros.* (5) it has always been considered that

(1) [1927] 1 K. B. 865.
(2) [1928] 2 K. B. 364.
(3) 138 L. T. 739; since reported p. 24 above.
(4) [1923] 2 K. B. 694.
(5) [1925] 2 K. B. 220.

the Rent Restrictions Acts operate in rem by attaching to a dwelling-house a standard rent which applies to the whole house, and where necessary also applies by apportionment to every part. In my judgment, when by reason of s. 2 of the Act of 1923 the standard rent no longer applies to the whole house, an apportioned part of it also ceases to apply to each and every part whether such part has ever been separately let or not. I think the decisions in *Cohen* v. *Gold* (1) and *Lloyd* v. *Cook* (2) were not right, and that *Ratkinsky's* case (3) was correctly decided.

The other question as to the meaning of "landlord" in s. 2 of the Act of 1923 is one of great difficulty. It seems quite clear that neither in the Act of 1920, nor in that of 1923, is the word used in the technical sense of a person between whom and the tenant a contractual relationship of landlord and tenant exists. An occupying tenant only requires the protection of s. 5 of the Act when his position as tenant under his contract is determined, and it is impossible to read that section without seeing that the landlord referred to in many of the sub-sections is the immediate landlord of the occupying tenant. For example, the landlord referred to in sub-s. (*c*) is the landlord who has received a notice to quit from his tenant. This clearly means the immediate landlord of the occupying tenant, he being the only person to whom the notice could be given. It also seems clear that if such an immediate landlord required the dwelling-house for occupation as a residence for himself within sub-s. (*d*), he would be the landlord for the purposes of that sub-section. It has been held, and I think rightly held, in Scotland, that "landlord" in sub-s. (*f*) includes a tenant who has sub-let. It seems clear also that under sub-s. (*i*) "landlord" must include a landlord who is himself a tenant, if he is the employer of the tenant therein referred to. In my judgment the effect of s. 2 of the Act of 1923 is to add to the various circumstances which under s. 5 of the Act of 1920 permit an order for possession to be made, and "landlord" in that

(1) [1927] 1 K. B. 865. (2) [1928] 2 K. B. 364.
(3) 138 L. T. 739; since reported p. 24 above.

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section includes any person who, but for the provisions of the Act of 1920, would be entitled to say to the occupying tenant: "Your tenancy has come to an end. Hand over the premises to me." In my opinion, s. 2 of the Act of 1923 provides that where the person claiming that the contract of tenancy between him and the occupying tenant has come to an end can prove to the Court that he was in possession of the whole of the dwelling-house on July 31, 1923, or subsequently to that date came into possession thereof, he establishes the decontrol of the house, and he is entitled to succeed in his claim for possession against the occupying tenant; once this state of things is proved, the Act is repealed so far as that house is concerned. I read the proviso as creating an exception in a case where the dwelling-house which is the subject matter of the dispute is part of a larger dwelling-house, enacting that in such a case the smaller dwelling-house shall not be decontrolled. I take the same view of s. 2, sub-s. 2, and indeed with reference to this sub-section the case seems even clearer than with reference to sub-s. (*i*), because, as has been decided, and I think rightly, the tenant therein referred to is the sitting tenant, and the only person who could under ordinary circumstances grant to the sitting tenant a further lease for two years is his immediate landlord. In most cases the freeholder with a tenant whose lease is still in operation would have no say in the question whether or not a two years' lease should be granted to the sitting tenant; the latter's tenancy is a tenancy between him and his immediate landlord. I think the construction of the Act of 1923 that has commended itself to me is one which carries out the probable intention of the Act of Parliament to bring about gradually the decontrol of property which was controlled for reasons which no longer apply.

It seems quite clear that the word "landlord" in s. 5 of the Act of 1920 cannot mean landlord in the ordinary accepted meaning of the word. The section is dealing with cases in which the tenancy at common law has come to an end. There is no longer a contractual landlord and a

contractual tenant. The person claiming possession from the occupying tenant is his ex-landlord. The word "landlord" is used in the sense of the person, be he himself a freeholder or a leaseholder, who is the ex-landlord of the occupying tenant. Sect. 5 gives to the tenant the absolute right to remain in possession notwithstanding the expiry of his tenancy, unless his ex-landlord can bring the case within one or other of the sub-clauses of the section. If he cannot do so, the ex-landlord is turned into a statutory landlord; if he does so the Court may make an order for possession. The matter will be made clearer by considering a concrete case. A. is the freeholder. He has let the whole of a dwelling-house at a rack rent for twenty-one years to B. B., after occupying for seven years, has lawfully sub-let on an annual tenancy to C., and has duly given him notice to quit, and after the notice has expired brings an action for possession in the county court. He proves that he let the house to C. as part of the terms of his employment of C., and claims the benefit of sub-s. (*i*). The Court has a discretion to make an order for possession under that sub-section. The leaseholder has himself duly performed all the terms of his subsisting lease from the freeholder. The freeholder is therefore out of the picture so far as the facts are concerned which the county court judge has to consider. It seems impossible to hold that the long leaseholder is not the landlord of the occupying tenant within the purview of s. 5, sub-s. (*i*). So, if B., instead of being the original lessee of A., had bought the lease and in other respects complied with sub-s. (*f*), it would be difficult to hold that he was not the landlord within the meaning of sub-s. (*f*). Similar considerations lead to a similar conclusion in any case where the immediate landlord of the occupying tenant can bring his case for possession within sub-s. (*g*).

In considering the construction of s. 2 of the Act of 1923, it seems necessary to consider the effect of s. 12, sub-s. 7, of the Act of 1920. It has been suggested that but for this sub-section the term "landlord" would in all cases mean the freeholder. In my judgment the sub-section has no

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such effect. I think it was inserted to prevent an occupying tenant under a lease from the ground landlord, or any other landlord who had let the premises to him for any reason at a rent less than two-thirds of the rateable value, from saying after the expiration of the lease that he was entitled to retain possession so long as he paid that rent, and not for the purpose of preventing him from being considered the landlord in a case where his lessee had let the house at a rack rent to the occupying tenant. I think the landlord under s. 5 is in every case the ex-landlord of the occupying tenant who is seeking an order for possession.

The considerations I have been dealing with affecting the meaning of the word "landlord" in s. 5 of the Act of 1920 seem to me equally to apply to the question arising in one of these cases as to the meaning of "landlord" in s. 2 of the Act of 1923, which by s. 4 has to be read as one with the Act of 1920, that is, as if it were contained in a section of that Act. In my judgment the word "landlord" in s. 2 of the Act of 1923 means the same person as it means in s. 5 of the Act of 1920, that is to say, the person who, being an ex-landlord of the occupying tenant, is asking for possession of the tenement on the determination of the contractual tenancy. Where such an ex-landlord can prove either that he was in possession of the whole of the dwelling-house at the date of the passing of the Act of 1923 (July 31, 1923), or since that date, the 1920 Act ceases to apply to that dwelling-house and every part of it, and the Court is bound to consider such a person's claim for possession or increased rent, independently of the Act of 1920. Once these facts are proved, the whole of the dwelling-house passes for ever out of the purview of the Act. It is "decontrolled" (to use a convenient word), not merely as between that landlord and that tenant, but for all purposes. If there be an outstanding tenancy between the freeholder and the occupying tenant's landlord, the rights of the parties to that tenancy agreement are put outside the Act, and they are for the future to be regulated by the subsisting agreement. The mesne landlord who has himself been freed from the restrictions of the Act, is himself

disentitled to claim its protection when his own landlord becomes by contract or at common law entitled to possession. I cannot myself see that this result is unreasonable or unfair. A mesne landlord who has himself obtained release from the shackles of the Act, has no grievance if the facts which entitle him to such release operate in favour of his superior landlord or landlords. I read the proviso not as an explanation of the meaning of the substantive parts of s. 2, but as an exception to it. I think if it had not been there, a mesne landlord who had let part of a house as a separate dwelling-house, and could prove that he was in possession of that part on July 31, 1923, would have been entitled to say that the part dwelling-house was decontrolled. The proviso was put in to prevent the tenant of a whole dwelling-house which had not been decontrolled from profiteering as to part of the dwelling-house, while his immediate landlord remained subject to control, and that the latter part of the proviso was inserted to enable his immediate landlord, if he got into possession of the rest of the house, to say that at any rate that part was decontrolled. I am confirmed in my view of the meaning of "landlord" in s. 2, sub-s. 1, by considering the provisions of sub-s. 2. It seems to me impossible to apply this section if "landlord" means the freeholder, where such freeholder is not the immediate landlord of the occupying or "sitting" tenant, as he has been conveniently called. So long as the mesne landlord has committed no breach of the head lease entitling the freeholder to possession as against him, the only person who could grant a two years' lease to the sitting tenant is his immediate landlord, and if the term "landlord" in this sub-section means the ex-landlord of the sitting tenant, I think that in the first sub-section it must also mean the ex-landlord of the sitting tenant, even where he is himself a lessee of a superior landlord. In my opinion there are no decisions of this Court that bind me to come to a different conclusion to that which I have expressed above. In *Glossop* v. *Ashley* (1) it was held by Scrutton L.J. that there can only be one standard rent of a house to which the Act

(1) [1922] 1 K. B. 1.

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applies, and by the whole Court that the rent to be considered as the standard rent of the material dwelling-house was the rent at which it was let by a lessee to an occupying tenant on August 3, 1914, and not the rent at which it was let by the freeholder to the leaseholder. This decision, though not directly in point, seems to me to support my view as to the meaning of the Acts of 1920 and 1923. As I have already pointed out, it has always been considered, and I think rightly considered, that the Rent Restriction Acts operate in rem, and not in personam, and it follows that the res in question, where the whole house is let, is not the tenancy agreement, but the whole material thing — the house and every part of it.

The only case that has occasioned me some difficulty is *Brookes* v. *Liffen* (1), but I do not think it really touches the points under consideration in these cases. The person in possession in that case at the material date was not a landlord and had never become a landlord at the time the question arose. He was never a person who had obtained freedom from the restrictions of the Act, and therefore his landlord could not say that he, the landlord, had also obtained such freedom. The position would have been different, in my judgment, if after obtaining possession the tenant had sub-let, and was claiming possession from the sub-lessee. Then the house would have been decontrolled for all purposes. If this is regarded as an odd or anomalous result of the Rent Restriction Acts, it would certainly not be the only one, and I cannot see in it any good reason why I should reject a construction of the Act which, for the reasons I have stated, appeals to me as the right construction.

My view of the meaning of s. 2, sub-s. 1, of the Act of 1923 is in accord with the opinion of Talbot J. in *Brookes* v. *Liffen* (2) when before the Divisional Court, and the opinion of MacKinnon J. in *Ratkinsky's* case (3) in one part of his judgment. In the former case Talbot J. said: "The object of the section is to confer certain rights on a man who is a landlord at the time when the question of his position as

(1) [1928] 1 K. B. 441; [1928] 2 K. B. 347. (2) [1928] 1 K. B. 441, 444.
(3) 138 L. T. 739; since reported p. 24 above.

against a tenant arises, if he can show that he was in possession of, or took possession of, the dwelling-house at either of the times specified in the sub-section." In *Ratkinsky* v. *Jacobs* (1) MacKinnon J. says: "It seems to me quite clear that where s. 2, sub-s. 1, of the Act of 1923 speaks of 'landlord' and 'tenant' it is referring to the two parties who will be protagonists before the Court in proceedings under s. 5 of the Act of 1920"; and it follows that the judgment of Darling J. in *Jenkinson* v. *Wright* (2) and the judgment of the Divisional Court in *Finey* v. *Gougoltz* (3) were right.

I now proceed to apply the above construction of s. 2 of the Act of 1923 to the five cases which we have to decide.

In *Lloyd* v. *Cook* a lessee for ninety-nine years came into possession of the whole of a house, No. 14 Eversholt Street, Camden Town, on August 12, 1926. She subsequently let two of the rooms, which were part of three rooms that had, before she took possession, been separately let. There was no evidence that Mrs. Cook's rent under her lease was less than two-thirds of the rateable value. It was held by the Divisional Court that though the whole house had been decontrolled, the dwelling-house comprised by the three rooms had not. In my judgment this decision is wrong. The decontrol applies, in my view, to the whole house, and to every part of it. Once there has been decontrol of the whole house, the Act is repealed with regard to it. This appeal should be allowed with costs.

In *Goudge* v. *Broughton* a freeholder by assignment obtained possession of a cottage and then let it to a tenant. The county court judge held that the cottage had come into the actual possession of the freeholder after the Act of 1923 was passed. The cottage had never been previously let, but had been occupied by the licensee of the previous owner. The freeholder gave notice to quit in accordance with the terms of the defendant's oral tenancy agreement. The county court judge held that the cottage had been decontrolled, and

(1) 44 Times L. R. 548, 550; pp. 24, 29 above. (2) [1924] 2 K. B. 645
(3) [1926] 2 K. B. 322.

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made an order for possession. The Divisional Court reversed this finding. In my judgment the county court judge was right, and ought not to have been reversed. The plaintiff was the landlord for the purposes of the Act. If the Act of 1923 had never been passed, he would have been a landlord seeking possession of his property, and liable to be defeated by s. 5 of the Act of 1920. As I have indicated, I think he is the person referred to as "landlord" in s. 2, sub-s. 1, of the Act of 1923, and having been in actual possession of the cottage since the passing of the Act, he was entitled to say that the cottage had been decontrolled. This appeal should be allowed with costs here and below.

In *Simson* v. *Miatt* the facts have been conveniently summarized by Scrutton L.J. and are stated in detail by Salter J. in the Court below. Until December 6, 1925, the plaintiff occupied as tenant to Miller at 60*l.* a year. On that date he bought Miller's long lease, and was then in possession under the long lease, a lease which came within sub-s. 7 of s. 12 of the Act of 1920, and could therefore be ignored. On April 17, 1926, he became the landlord of three rooms which he let to Miatt. If I am right as to the meaning of "landlord" in s. 2 of the Act of 1923, he was a landlord, who, having been in possession of the whole house since July, 1923, would be entitled to say that the house was outside the Act, and he was therefore entitled to recover possession. I think this appeal should also be allowed.

In *Barker* v. *Hutson* the freeholder was in possession of No. 3 Oxford Road, Ealing, a previous statutory tenant having given up possession. The freeholder let the whole house to the plaintiff, who then sub-let two rooms to the defendant. He gave the defendant due notice to quit. The defendant refused to quit, and claimed apportionment. The judge, following *Cohen* v. *Gold* (1), held that the dwelling-house consisting of the two rooms never having been previously let, they were not decontrolled, and the Act still applied to them. His judgment was affirmed. As already indicated, my view is that the whole house was decontrolled by the

(1) [1927] 1 K. B. 865.

possession obtained by the defendant's landlord, the plaintiff, and the judgment of the Divisional Court should be reversed with costs here and below.

Bartram v. *Brown* was an action for damages for illegal distress. The distress was made without the leave of the Court required by s. 6 of the Act of 1920. The question was whether on the proved facts, the Act of 1920 had ceased to apply. The county court judge found that the defendant had never been in actual possession of the house or any part of it that was let to the plaintiff, therefore it could not be said that the house was decontrolled, and gave judgment for damages, agreed at 35*l.*, against the defendant. This judgment was affirmed, and I agree that this appeal should be dismissed with costs.

SANKEY L.J. As in every case I have reached the same result as my Lord and Greer L.J. have, I propose without recapitulating the facts at length to state as briefly as possible the reasons which have led me to my conclusions. My reasons are the same as those which have commended themselves to Greer L.J. I should like to express a hope that these matters will be taken to the House of Lords in order that the supreme tribunal may give a final authoritative opinion to assist the learned judges of county courts, who have my sympathy in their daily task of administering these difficult and embarrassing Acts.

These cases in a variety of ways involve the proper construction of the decontrolling section—namely, s. 2 of the Rent and Mortgage Interest Restrictions Act, 1923. Referring to them for the moment very briefly :—

In *Goudge* v. *Broughton* the plaintiff brought his action for possession of the premises. The county court judge decided in his favour, but the Divisional Court reversed that decision upon the ground that the house was still controlled and the plaintiff was not entitled to possession.

In *Lloyd* v. *Cook* the plaintiff brought an action for apportionment of the standard rent of the dwelling-house. The county court judge decided in favour of the defendant

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upon the ground that the house had become decontrolled, but the Divisional Court reversed that decision.

In *Simson* v. *Miatt* a tenant issued a summons for apportionment of the standard rent, whereupon the plaintiff brought an action for possession. The summons for apportionment was adjourned and the county court judge gave judgment for the defendant upon the ground that the house was still controlled, and the Divisional Court upheld the judgment.

In *Bartram* v. *Brown and Odell* the plaintiff brought an action for an illegal distress, on the ground that the defendant was his landlord, that the premises were still controlled, and that therefore the distress was illegal, as the leave of the Court had not been obtained for it. The county court judge decided in favour of the plaintiff tenant—namely, that the house had not become decontrolled, and the Divisional Court affirmed his judgment.

In *Barker* v. *Hutson* the plaintiff brought an action for possession of a dwelling-house. There was a cross-claim for apportionment of the standard rent. The county court judge decided in favour of the defendant upon the ground that the premises were still controlled, and the Divisional Court upheld him.

There have been numerous decisions upon the meaning of the puzzling section, some of which are in direct conflict with others. In all these cases however it is important to ascertain the facts carefully before endeavouring to apply the law to them. In some of the cases the question was one of fact for the county court judge; in others again it may be possible to support the decision upon different grounds; in yet others the appellant may not have taken the proper point in the Court below, but as the construction of the section is one of general application an endeavour must be made to state its real meaning and then to consider each of the cases upon its particular facts.

The effect of the decontrolling section is to exclude certain dwelling-houses from the application of the principal Act of 1920, in certain events; in other words, to set them free from control. The Legislature might have done nothing upon the

question of decontrol. It might have repealed the Act and removed the control altogether, but it appears to have taken a middle course, possibly with the object of effecting decontrol gradually; possibly with the object of protecting the sitting tenant, and possibly too with the object of decontrolling where the landlord, who for the moment may be called the occupying landlord, has got into actual possession, subject to the proviso contained in s. 2, that where a tenant has sub-let a part of his dwelling-house but has got into possession of that part, that part does not become thereby decontrolled, the desire being to prevent a tenant profiteering by a sub-tenancy at a time when his own landlord is prevented by the Act from doing so.

It is to be observed that the principal Act, by s. 12, sub-s. 2, applies to a house or part of a house let as a separate dwelling. Sect. 12, sub-s. 1 (*f*) and (*g*), define the expressions "landlord" and "tenant," although it must be noticed that the language there used is that the expression "landlord" includes the person there referred to; it is not an exclusive but an inclusive definition. Sect. 12, sub-s. 7, which creates the greatest difficulty, makes the Act apply to certain dwelling-houses as if a certain tenancy had never existed, and s. 4 of the 1923 Act says that that Act is to be construed as one with the principal Act. It must be taken now that the Act operates in rem and not in personam. See remarks of Sargant J. when sitting in the Court of Appeal in *Prout* v. *Hunter*. (1)

The decontrolling section, s. 2, effects its object, broadly speaking, by saying that where after the passing of the Act, that is to say after July 31, 1923, the landlord gets into possession of the whole of the dwelling-house (sub-s. 1 subject to the proviso), or grants to the tenant a valid lease for a certain term (sub-s. 2), the house becomes decontrolled. Sub-s. 3 defines possession as meaning actual possession.

The way however in which the section is drafted, coupled with the very puzzling s. 12, sub-s. 7, of the 1920 Act, makes a logical interpretation of the Act almost impossible, and it becomes necessary to see what is the real meaning of the word

(1) [1924] 2 K. B. 736, 744.

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"landlord" as used in the section. I am forced to the conclusion that the meaning of the word must to some extent be governed by the context in which it is used and the circumstances under consideration. In my view the draftsman was considering the position at the time at which in the particular case a question arose for determination and what the parties to an action would have to prove to establish their rights. The word "landlord" in s. 2, sub-s. 1, must be loosely used, because strictly speaking there cannot be a landlord without a tenant and a tenure, and the sub-section deals with a case where there is neither tenant nor landlord: see *Brookes* v. *Liffen*. (1) I cannot think that the word "landlord" when used in the section always means the freeholder; or a person who has a tenant. I agree with the view expressed by MacKinnon J. in *Ratkinsky* v. *Jacobs* (2): "I have no doubt, speaking for myself, that the view expressed in *Cohen* v. *Gold* (3) that 'landlord' in s. 2, sub-s. 1, of the Act of 1923 has the highly technical meaning of a person who has a tenant, so that a relation of tenure exists between them, is not correct. I think that 'landlord' there means 'owner' or one of the two parties to the litigation contemplated by s. 5 of the Act of 1920, and that therefore in this case the landlord was in possession or had come into possession of the whole house." The word may include, in certain circumstances, the freeholder. It may include a person who is tenant to the freeholder, for such a person may be the landlord of some sub-tenant. You must look at the relationship which exists between the two parties to the action and see whether one stands in the relation of tenant to the other. For example, supposing A. lets to B., and B. sub-lets part to C. In an action between A. and B., A. is the landlord. In an action between B. and C., B. is the landlord. I am of opinion that "landlord" may be any person who since August 31, 1914, has let or has been entitled to let conditionally or unconditionally a dwelling-house to which the Act applies, or any part thereof.

(1) [1928] 2 K. B. 347. (2) P. 30 above; 44 Times L. R. 548, 550.
(3) [1927] 1 K. B. 865.

Discussing the cases under appeal, it is convenient to deal with several of those which have already been decided, and chiefly with the case of *Cohen* v. *Gold.* (1) In my view that case was wrongly decided and should be overruled. The learned judge is reported to have said (2): "How can you say that the plaintiff was 'landlord' of this dwelling-house at the passing of the Act of 1923, when there was no tenancy existing?" The decision proceeds upon that ground. In my opinion the plaintiff in that case was the landlord of the dwelling-house, he did become in actual possession of it, and the premises did become decontrolled and he should have been entitled to succeed.

I agree with the decision of Branson and MacKinnon JJ. in *Ratkinsky* v. *Jacobs* (3), and I think that case was rightly decided and on proper reasoning. I think, too, that the judgment of Darling J. in *Jenkinson* v. *Wright* (4) is correct.

I now proceed to deal in detail with each of the cases under appeal.

GOUDGE *v.* BROUGHTON.

In this case the plaintiff brought his action for possession. The learned county court judge found as a fact that the plaintiff did get actual possession of the premises. There was evidence upon which he could so find. The Divisional Court reversed that decision, Salter J. saying: "We must hold, on the authority of *Cohen* v. *Gold* (1), that the plaintiff failed in showing that he was landlord of the premises," and reversed the decision of the county court judge. Being of opinion that *Cohen* v. *Gold* (1) is wrong, I come to the conclusion that the plaintiff did get into actual possession, that he was the landlord, that the premises did become decontrolled, and that therefore the decision of the Divisional Court should be reversed.

LLOYD *v.* COOK.

With regard to this case the facts will be found reported in 44 Times L. R. at p. 455. The learned judge in the county court held that the dwelling-house, consisting of two rooms let to Lloyd, had become decontrolled by reason of having

(1) [1927] 1 K. B. 865.
(2) [1927] 1 K. B. 866.
(3) 138 L. T. 739; since reported p. 24 above.
(4) [1924] 2 K. B. 645.

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been in the actual possession of Mrs. Cook between the time when Churchman vacated the rooms and the time when Lloyd came in. The Divisional Court reversed this decision, relying on the authority of *Cohen* v. *Gold.* (1) I think in this case also the decision of the Divisional Court must be set aside. It must be remembered with regard to this case that an appellant cannot succeed upon a point not taken before the county court judge.

SIMSON *v.* MIATT.

In this case the facts were of a complicated character, and it is not easy to follow exactly what took place in the county court, but in my view the county court judge omitted to consider the effect of sub-s. 7 of s. 12 of the 1920 Act. The long lease of Miller must be disregarded, the plaintiff was a landlord within the meaning of s. 2 of the 1923 Act and had been in actual possession of the dwelling-house since July 31, 1923. The house therefore was decontrolled and the plaintiff was entitled to judgment. The appeal should be allowed.

BARTRAM *v.* BROWN.

In this case the facts again were complicated. They will be found set out at 44 Times L. R. on p. 572. I am of opinion that that case was rightly decided. The word "tenant" in s. 2, sub-s. 2, of the Act must in my view refer to the particular person who is the tenant at the time when the lease referred to in the sub-section is granted, and to no other person. In this case again the question was one of fact for the county court judge, upon which I do not think he in any way misdirected himself. He was entitled to find and did find that Brown never came into actual possession of the whole of the dwelling-house, and therefore the premises did not become decontrolled. Mrs. Simpson was not there merely by leave and licence. There is evidence that she paid rent.

BARKER *v.* HUTSON.

In this case the plaintiff as landlord brought an action for possession. There was a cross-summons for apportionment.

(1) [1927] 1 K. B. 865.

The learned judge, acting on the authority of *Cohen* v. *Gold* (1), said: "The dwelling-house the subject of these proceedings, viz., the two rooms let to the defendant had never previously been separately let—that first became a separate dwelling on such letting to the defendant and no one qua landlord has since had or recovered possession of the premises. The case of *Cohen* v. *Gold* (1) applies." The following facts however were proved. The plaintiff took a tenancy of two years from December 25, 1926, from the freeholders of the premises, who were at that time in possession of the house. Previously to that a Mrs. Eldridge had been in possession as statutory tenant and had given up possession to the landlord. The judge's judgment is very brief, probably quite rightly, as he says that as far as he was concerned he was bound to say that the case was concluded by *Cohen* v. *Gold*. (1) The Divisional Court upheld the judgment upon the same ground. For reasons already given the appeal must be allowed and judgment entered for the appellant.

LLOYD *v.* COOK.

Appeal allowed.

Solicitor for appellant: *E. M. Tringham.*
Solicitor for respondent: *A'Deane Gent Wood.*

GOUDGE *v.* BROUGHTON.

Appeal allowed.

Solicitors for appellant: *G. Brown Son & Vardy, for Bacon, Phillips & Pringle, Redhill.*
Solicitors for respondent: *Westbury Preston & Stavridi, for Grece & Patten, Redhill.*

SIMSON *v.* MIATT.

Appeal allowed.

Solicitor for appellant: *W. Bird.*
Solicitor for respondent: *A'Deane Gent Wood.*

(1) [1927] 1 K. B. 865.

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BARTRAM *v.* BROWN AND OTHERS.

Appeal dismissed.

Solicitors for appellant: *Alfred Double & Sons.*
Solicitors for respondents: *Henniker Rance & Co.*

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Appeal allowed.

Solicitors for appellant: *Lambert & Hale, for Lambert, Hale & Procter, Ealing.*
Solicitor for respondent: *A'Deane Gent Wood.*

W. H. G.

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Jan. 29, 30; *Feb.* 17.
C. A. *June* 5, 6, 15.

SMITH, HOGG AND COMPANY, LIMITED *v.* LOUIS BAMBERGER AND SONS.

Shipping—Charterparty—Bill of Lading—Discharge of Cargo "alongside"—Discharge on Quay—Discharge into Lighters—Custom of Port—Expenses—Liability.

A charterparty providing for the carriage of a cargo of deals from Archangel to London contained the clause: "The cargo to be brought to and taken from alongside the steamer at charterers' risk and expense as customary"; and that clause was incorporated in the bills of lading. By the custom of the Port of London, in the case of timber to be discharged on to the quay, the shipowner was bound to unload the timber on to the quay and stack it there, and in the case of timber to be discharged into lighters he was bound to deliver and stow it in lighters sent alongside by its receivers.

The shipowners discharged part of the cargo on to the quay, stacking it in tiers, the stack beginning close to the ship's side and extending back 30 feet; the remainder of the cargo they discharged into lighters brought to the side of the ship:—

Held, (1.) that as regards cargo to be discharged on to the quay the obligation of the shipowners under the contract in the bills of lading to discharge the cargo "alongside" the steamer was not satisfied when they had rendered it available for release from the steamer's tackle upon the quay or laid it with one end resting on the ship and the other end on the quay, but that they were bound to stack the cargo on the quay

in the way they did in accordance with the custom, which was not inconsistent with the terms of the contract.

The Turid [1922] 1 A. C. 397 distinguished.

(2.) That as regards cargo to be discharged into lighters the obligation of the shipowners was to deliver and stow the cargo in the lighters.

Decision of Wright J. reversed in part.

ACTION tried in the Commercial Court by Wright J.

By a charterparty dated September 13, 1926, and made between Messrs. Smith, Hogg & Co., the plaintiffs, owners of the steamship *Fernhill*, and the White Sea Timber Trust, Ld., London, it was provided that the steamship should load at Archangel a full cargo of deals, battens or boards, and deliver the same within a range of ports as ordered. The charterparty contained the following clause: 3. The cargo to be discharged with customary steamship despatch as fast as steamer can deliver during the ordinary working hours of the respective ports, "the cargo to be brought to and taken from alongside the steamer at charterers' risk and expense as customary." The *Fernhill* loaded a cargo of 1125 standards, the planks measuring between 10 and 20 or 25 feet in length, and she was ordered to the Surrey Commercial Dock to discharge. In September and October, 1926, the plaintiffs issued under that charterparty 63 bills of lading in respect of the cargo. Messrs. Louis Bamberger & Sons, the defendants, were the indorsees of 31 of these bills of lading representing 569 standards of the cargo. These bills of lading incorporated the terms and conditions of the charterparty including the clause above mentioned so far as they related to discharge.

On the arrival of the steamship at the dock, and before the commencement of her discharge, the plaintiffs, by letter dated October 20, 1926, gave to the defendants notice of their intention to claim from the defendants the cost of taking the cargo from alongside. The plaintiffs then proceeded to discharge the cargo, part of which was discharged on to the quay and the rest into lighters. Of the 569 standards, of which the defendants were receivers, 326 standards were discharged on the quay and 243 standards into lighters, which had been sent alongside by the defendants. The discharge

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was in accordance with the method adopted at the Surrey Commercial Dock, which was as follows :—

As regards discharge on to the quay, the ship came alongside the quay, her rail being about 3 feet distant from the edge of the quay. The Port of London Authority allotted a space on the quay appropriated to the cargo which was to be landed. That space was about the length of the ship, with an open space in the middle corresponding to the amidships area of the ship, where there was no cargo, and extending back over the quay for 30 feet or 32 feet from the side of the quay. The deck load was first discharged by hand. The discharge was conducted by a gang of 13 men, 9 on the ship and 4 on the quay. The pieces, so far as they were landed before the winches and derricks were brought into use, were handed separately over the ship's side and taken by the men on the quay. As the landing proceeded the pieces were laid on the quay so as to cover the whole allotted area with a single layer and so as to overlap the quay edge for about 3 feet or 6 feet. As soon as sufficient deck cargo was discharged to release the winches the rest of the deck cargo and the cargo in the holds was discharged by means of the ship's derricks and slings, the derricks having a swing of about 3 feet inshore over the quay edge. The planks in the sling descended on the quay, and were brought to rest with one end resting on the quay and the other end on the ship's rail. The men on the quay released the sling and picked up or lapped the planks, building them into a pile which finally covered the allotted area to a height of 15 feet or 20 feet. The pile was built by first building up the margins to 7 or 8 tiers, then filling in the middle space, and then repeating the process until all the cargo was discharged and piled. When the pile rose in height, what was called a fore and after—that is to say, two uprights and a cross-piece—was built above the ship's rail, and was used for the planks as they came out of the slings to rest against in place of the ship's rail, because the ship's rail was no longer at a sufficient elevation above the level of the timber on the shore. Each derrick always put the planks down at the same place,

and the men carried them away in order to do the operation of piling, which was only rough piling. The planks were discharged and piled, without separation according to the bill of lading sizes or marks. By a subsequent operation, which did not concern the ship on any view, the planks were carried away from the quay and measured and stowed or stacked in a place appropriate to the storage of timber.

As to cargo landed overside into lighters the position was somewhat different. Delivery overside was to bills of lading, sizes and marks, if any. The receivers' lighter came alongside, and in addition to the 13 men on the ship, 4 men were provided by the ship to take delivery into the lighter. At first the deck cargo had to be delivered by hand, and it was put over the ship's side into the lighter, where the men received it, getting the lengths, as far as possible, fore and aft of the lighter, and then they laid it on to the bottom of the lighter so as to fit in closely, otherwise the lighter would become top heavy. The lighters were about 10 feet beam and about 30 feet in length. When the derricks were working the pieces were slung over into the lighters and were guided into a fore and aft direction, and the sling was released so that the pieces fell with one end resting on the bottom of the lighter, or the bottom layers of timber, and the other end against the central athwartships beam in the lighter. As the discharge progressed the layers of timber rose in the lighter, and a pair of uprights with a cross-beam was rigged up across the beam of the lighter so that the upper ends of the deals, when released from the sling, might rest against it and the other ends rested on the deals in the bottom. The planks had to be placed in position in the lighter, and when they reached above the gunwale the tiers had to be bound by cross-tiers being interposed between the fore and aft tiers. This course was necessary in order to prevent the timber falling off. The whole method of stowage of the timber was necessary, not only to enable the lighter to carry the full load but also to render her seaworthy and navigable. When the lighter was loaded the receivers' men took her away from alongside.

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The plaintiffs brought this action against the defendants for damages for alleged breach of the above mentioned clause in the charterparty and bills of lading, or alternatively, as the amount due thereunder for discharging expenses payable by the defendants, or as money paid by the plaintiffs for the use of the defendant.

The plaintiffs alleged in their points of claim (para. 1) that the defendants were the indorsees of bills of lading containing that clause, and that alternatively the defendants obtained delivery of the cargo under a contract implied from the circumstances to pay all moneys payable under and to perform the terms of the bills of lading as to discharge and receipt of the cargo; (para. 2) that in breach of their obligations under the bills of lading the defendants did not take the cargo from alongside the steamer; that the plaintiffs were therefore obliged to take the cargo from alongside and carry part of it across the quay and pile it at the usual place, and carry the remaining part of it into lighters and there stow it at a cost of 102*l.* 9*s.* 3*d.*; and that thereby the plaintiffs suffered damage; (para. 3) that in the alternative the plaintiffs took the cargo from alongside and carried and piled and stowed it at the cost aforesaid, which was payable by the defendants to the plaintiffs under the bills of lading; (para. 4) that in the premises the defendants impliedly requested the plaintiffs to take the cargo from alongside and to pay for that being done, or alternatively the plaintiffs were compelled to take the cargo from alongside or to pay for that being done, and the plaintiffs paid the said money at the implied request of the defendants; and (para. 5) that alternatively the plaintiffs paid the money which the defendants were bound to pay and the defendants had the benefit thereof and were therefore bound to pay the plaintiffs.

The defendants in their points of defence stated (para. 3) that they denied that in breach of their obligations under the bills of lading or at all they did not take the cargo from alongside the steamer; and that alternatively they denied that the plaintiffs were obliged to carry out the work by reason of any breach of their obligations by the defendants;

(para. 5) that alternatively, if and so far as the plaintiffs' claim was for stacking the timber alongside, then by the custom of the Port of London the shipowner was bound in the case of timber to be discharged on to the quay to unload and stack the timber on the quay alongside the vessel; (para. 6) that, if the plaintiffs carried part of the cargo into lighters and there stowed it, then by the custom of the Port of London the receiver in the case of timber to be discharged into lighters was liable only to provide sufficient open lighters alongside ready to receive the goods, and was under no obligation to have any men on the lighters to receive the goods or to stow them therein, and the shipowner was bound to do the whole work of delivering the goods into open lighters and of stowing them therein; (para. 7) that alternatively the shipowner by the said customs bore all costs of the unloading and stacking on the quay, and the delivery and stowage in the lighters save a small sum for trimming; (para. 9) that the alleged work was not done nor the moneys paid at the request, express or implied, of the defendants; and (para. 10) that alternatively the timber consisted of parcels deliverable to different consignees under different bills of lading and bearing different marks, and the plaintiffs were bound to sort it prior to tendering delivery to the different receivers, but did not do so.

The plaintiffs in their reply said that the customs were unreasonable and void, and were inconsistent with the terms of the charterparty and bills of lading and inadmissible in evidence.

At the trial of the action evidence was called on behalf of the plaintiffs which went to show that at the Surrey Commercial Dock the method of discharging cargo on to the quay and into barges respectively was as stated above. On behalf of the defendants no witnesses were called, but in regard to the alleged customs reliance was placed upon certain statements which are set out below in the judgment of the learned judge.

Le Quesne K.C. (*Sir R. Aske* with him) for the plaintiffs. The plaintiffs are entitled to recover from the defendants

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the amount which they claim. The contract between the parties provided that the cargo was to be taken from alongside the steamer at the defendants' risk and expense. Under that contract, as regards cargo discharged on to the quay, the obligation of the plaintiffs was only to place the cargo over the side of the steamer on to the quay, and the obligation of the defendants then arose to take it from that position, and a custom of the port imposing any part of that latter obligation upon the plaintiffs was inconsistent with the contract and not binding upon the parties: see *Palgrave, Brown & Son, Ld.* v. *S.S. Turid* (1); *The Rensfjell* (2); *Aktieselskabet Dampsskibsselskabet Primula* v. *Horsley & Co.* (3); *Hillas & Co.* v. *Rederi Aktiebolaget Aeolus* (4); and *Mowbray, Robinson & Co.* v. *Rosser.* (5) As regards cargo discharged into lighters the principles are similar, the obligation of the plaintiffs being to pass the cargo over the side of the steamer into the lighter, and the obligation of the defendants being to receive and stow the cargo in the lighter, and any custom to the contrary being inconsistent with the contract: see *The Turid* (1) and *Aktiesel[s]kab Helios* v. *Ekman & Co.* (6) In *Glasgow Navigation Co.* v. *Howard, Brothers & Co.* (7) the point was not taken that the custom was inconsistent with the contract. The defendants did not perform their obligations under the contract by taking from alongside the steamship either the part of the cargo which was to be delivered on to the quay or the part which was to be delivered into lighters. It accordingly became necessary for the defendants to incur the expense of doing that part of the work, and they did so under protest.

Jowitt K.C. (*J. Dickinson* with him) for the defendants. The plaintiffs are not entitled to recover from the defendants the sum which they claim in respect of the expense of work done in discharging the cargo.

(1) [1922] 1 A. C. 397.
(2) (1924) 131 L. T. 764; 40 Times L. R. 458.
(3) (1923) 40 Times L. R. 11.
(4) [1926] W. N. 315; 96 L. J. (K. B.) 186; 32 Com. Cas. 69.
(5) (1922) 91 L. J. (K. B.) 524; 38 Times L. R. 413.
(6) [1897] 2 Q. B. 83 (a letter has dropped out in the title of the case).
(7) (1910) 15 Com. Cas. 88; 102 L. T. 172.

By the custom of the Port of London the plaintiffs were bound to do the work in question or to bear the expense of it. According to that custom, where timber is to be discharged on to the quay it is the duty of the shipowner to unload and stack it on the quay alongside the vessel, and where timber is to be discharged into lighters it is the duty of the shipowner to unload it into lighters brought alongside the vessel and to stow it therein. That custom is not inconsistent with the contract between the parties in the present case if it imposes no greater obligations upon them respectively than to bring the cargo to and take it from alongside the steamer as customary. If it does not increase the duties which by their contract the parties have to perform alongside the steamer, it is admissible for the purpose of annexing incidents to their express contractual obligations. Here the custom does not increase or vary the meaning of "alongside" as used in the contract. In considering the meaning of that word regard must be had to the extent of the services to be rendered, and to the place where they are to be rendered. In the case of timber to be discharged alongside on to the quay, the authorities go to show that the obligation of the shipowner is to put the timber on to the quay and to stack it there. A piece of timber is not discharged from the ship while one end of it is resting on the quay and the other on the ship. When the quay itself is alongside the ship all goods put on the quay are put alongside the ship. Where the cargo is large it is not possible that when discharged it can all be close to the rail of the ship. In that case, if the nearest part of the cargo is close to the ship the whole is alongside. In several decided cases a custom of the port regulating the mode of discharging the cargo has no doubt been held inconsistent with a contract to take the cargo from alongside, but in these cases the custom imposed specially onerous work upon the shipowner, such as to erect staging over a space between the vessel and the quay or to render some additional service after the cargo had been discharged, and it is submitted that none of these cases supports the view that in the present case the custom is inconsistent with

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the contract: see *The Turid* (1); *The Nifa* (2); *Northmoor Steamship Co.* v. *Harland & Wolff* (3); *The Rensfjell* (4); *Aktieselskabet Dampsskibsselskabet Primula* v. *Horsley & Co.* (5); and *Hillas & Co.* v. *Rederi Aktiebolaget Aeolus.* (6) In the case of timber to be discharged alongside into lighters the obligation of the shipowner is to put the timber into the barge and to stow it there: *Aktieselkab Helios* v. *Ekman & Co.* (7) and *Glasgow Navigation Co.* v. *Howard, Brothers & Co.* (8) There is no essential distinction between the delivery of cargo alongside on to the quay and into lighters.

Secondly, if the custom of the port is inadmissible, the rights of the parties depend entirely upon the actual terms of the contract between them. By the terms of this contract the plaintiffs were bound to deliver to each consignee his parcel of the goods according to bill of lading sizes and marks, but in disregard of that obligation they delivered the whole of the goods on to the quay unsorted and mixed together in one lump. The plaintiffs having themselves committed a breach of the contract cannot maintain this action for an alleged breach of it against the defendants.

Thirdly, whether the custom be admissible or not, the plaintiffs, having incurred the expenses in question, voluntarily with express notice of the fact that the defendants denied liability for them, are not entitled to recover them from the defendants: see *Glasgow Navigation Co.* v. *Howard, Brothers & Co.* (9) and *Aktieselskabet Dampskibs Steinstad* v. *Pearson & Co.* (10) It is immaterial that the plaintiffs incurred the expenses under protest: *Maskell* v. *Horner.* (11)

Le Quesne K.C. in reply. The custom is inadmissible because inconsistent with the contract to take the cargo from alongside. The recent decisions which have been cited show that under a contract to bring cargo to and take it

(1) [1922] 1 A. C. 397.
(2) [1892] P. 411.
(3) [1903] 2 I. R. 657.
(4) (1924) 131 L. T. 764; 40 Times L. R. 458.
(5) (1923) 40 Times L. R. 11.
(6) [1926] W. N. 315; 96 L. J. (K. B.) 186; 32 Com. Cas. 69.
(7) [1897] 2 Q. B. 83.
(8) 15 Com. Cas. 88; 102 L. T. 172.
(9) 102 L. T. 172; 15 Com. Cas. 88.
(10) 137 L. T. 533; 43 Times L. R. 531.
(11) [1915] 3 K. B. 106.

from alongside the ship the only obligation of the shipowner is to lift the goods over the rail of the ship and place them upon the quay or the barge, as the case may be. This also appears from the cases of *Petersen* v. *Freebody & Co.* (1) and *Brenda Steamship Co.* v. *Green.* (2) In *Aktieselkab Helios* v. *Ekman & Co.* (3) the custom imposed a smaller burden on the shipowner than the custom now in question, and it was admitted as not being inconsistent with the contract. As to the suggestion that the plaintiffs are suing for money which they paid voluntarily and are not entitled to recover, it is to be remembered that the real claim of the plaintiffs is for damages for breach of contract by the defendants. The cause of action here is the same as in *Fletcher* v. *Gillespie* (4); *The Nifa* (5); *Brenda Steamship Co.* v. *Green* (2); and *The Turid.* (6) In *Aktieselskabet Dampskibs Steinstad* v. *Pearson & Co.* (7) the payment was wholly voluntary. The case of *Maskell* v. *Horner* (8) is also distinguishable, for there the money sued for had been paid to the defendants themselves, whereas here it was paid to third parties. The plaintiffs having had to pay under protest a sum for which the defendants were legally liable are entitled to recover the amount from the defendants: *Wilson's Music and General Printing Co.* v. *Finsbury Borough Council* (9) and *Falcke* v. *Scottish Imperial Insurance Co.* (10)

WRIGHT J. This is a claim by the owners of the steamship *Fernhill* against the defendants, who were receivers of cargo under certain bills of lading. The *Fernhill* had loaded a cargo of deals, battens, or boards, and delivered that cargo at the Surrey Commercial Dock. [His Lordship stated the quantity of the cargo and of the portion of it of which the defendants took delivery on the quay and into lighters respectively.] The plaintiffs' claim is for certain expenses incurred in the operation of discharging the ship. They say that that part of the operation ought to have been performed

(1) [1895] 2 Q. B. 294.
(2) [1900] 1 Q. B. 518.
(3) [1897] 2 Q. B. 83.
(4) 3 Bing. 635.
(5) [1892] P. 411.
(6) [1922] 1 A. C. 397.
(7) 137 L. T. 533; 43 Times L. R. 531.
(8) [1915] 3 K. B. 106.
(9) [1908] 1 K. B. 563, 568.
(10) (1886) 34 Ch. D. 234, 249.

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by the defendants, and they accordingly claim that these expenses should be borne by the defendants as receivers under the terms of their bill of lading. The plaintiffs say they incurred these expenses under protest—the defendants having repudiated all liability—and under notice that they would claim repayment from the defendants. Their claim is put as for damages for breach of contract, or, alternatively, for money paid at the implied request of the defendants. [His Lordship stated the material provisions of the charter-party and bills of lading, described the method of discharging cargo at the Surrey Commercial Dock substantially as above set out and continued as follows :] The claim in the action was that by the contract the defendants, as receivers, had promised to bear all expenses "from alongside" because the contract is that the cargo is to be taken from alongside "at charterers' "—that is here the bill of lading holders'—"risk and expense as customary." That involves two questions: What is meant by "alongside," and at what point does delivery by the ship cease and the taking by the receivers begin? The defendants relied on certain customs, the existence of which was not disputed by the plaintiffs, but their admissibility was disputed because the plaintiffs contended that they were inconsistent with the contract. It is necessary to distinguish delivery on to quay from delivery into lighters, in respect of which a separate custom was alleged and admitted. As to the former the custom was thus stated, and it is set out at some length: "The goods are discharged from the steamer by the ship's stevedores with the ship's tackle, and stacked by the stevedores on to the quay without sorting to bill of lading sizes or marks. The first pieces discharged are used to make a stage projecting over the quay for about 6 feet towards the side of the steamer, and as the cargo is discharged a stack is made varying in size with the quantity discharged on to the quay but generally not exceeding the length of the steamer and extending back about 30 feet from the edge of the stage. The timber is later carried away from the stack by the Port of London Authority and by them sorted to bill of lading sizes and

marks and piled in the usual place for storing timber. The ship's stevedores' charges for discharging the cargo and stacking it on the quay are paid by the shipowner and the Port of London Authority's charges for carrying the cargo from the quay and sorting and piling are paid by the consignees." As to the later discharge into lighters the custom was stated to be, as set out in the case of *Glasgow Navigation Co.* v. *Howard Brothers & Co.* (1), in these terms: "By the custom and practice of the Port of London in the case of cargoes of lumber (including both Baltic and pitch pine lumber), the receiver is only liable to provide sufficient open craft alongside ready to receive the goods from the ship, and is under no obligation to have any men on such open craft to receive the goods from the ship's tackle or to stow the goods therein. The shipowner is bound to do the whole work of delivering the goods into the craft and of stowing the goods therein in the reasonable and ordinary manner so that the goods may not be damaged or imperilled, and so that the craft may be loaded to the usual and reasonable extent and may be properly and safely navigable." As was pointed out by the Court of Appeal in some of the cases to which I shall refer, the question at issue must now be considered in the light of the decisions with reference to similar customs at other ports. The leading case is that of *The Turid* (2), which was a case of delivery on to quay. In the judgments the cases relating to delivery into lighters are also discussed as distinguishable. I shall revert to that discussion later when I deal with delivery alongside into lighters. Clause 3 of the charterparty in that case was identical with the relevant clause now under consideration. It is, I think, clear from the judgments that the word "alongside" is to be construed in its natural and ordinary significance and that that meaning cannot be varied by a customary manner inconsistent with fact: see also to the same effect the judgment of the Court of Appeal in *Mowbray, Robinson & Co.* v. *Rosser*. (3) In *The Turid* (2) Lord Birkenhead,

(1) 15 Com. Cas. 88; 102 L. T. 172.
(2) [1922] 1 A. C. 397, 404.
(3) 91 L. J. (K. B.) 524; 38 Times L. R. 413.

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whose judgment was concurred in by Lord Parmoor and Lord Atkinson, said: "I am myself of opinion that the word 'alongside,' if it does not suggest actual contact, does at all events suggest close contiguity, and not the less so because the ordinary obligation of the shipowner is admittedly only to deliver to the consignee the cargo his ship carries at ship's rail. A contract which requires delivery elsewhere extends this legal obligation." Lord Sumner said: "Doubtless the words 'alongside the steamer' may be satisfied, though the apparatus of reception, be it barge or cart, or what not, may not be in actual contact with the ship's side. It may well be that the ship can be required to deliver to the full reach of her tackles." (1) In that case the steamer lay 13 feet out from the quay, and staging was necessary to be erected between the steamer's side and the quay, and the timber was carried over that staging and across the quay and piled on to a dump commencing about 10 feet from the edge of the quay. The House of Lords held that the cost of erecting the staging and carrying the timber across it and piling it on the dump fell on the receivers and was not part of the shipowner's obligation to discharge alongside, and that a custom to the contrary was inconsistent with the charterparty. That case followed a decision in the case of *Holman* v. *Wade* (2), and a decision in *The Nifa* (3), where the steamer was moored 15 feet from the quay edge and the facts as to discharge were substantially similar. In the case of *Aktieselskabet Dampsskibsselskabet Primula* v. *Horsley & Co.* (4), under similar words of contract Greer J. said: "It was impossible to say that the goods were not alongside when they were on the quay before the sling was taken off," and he refused to make the shipowners responsible for the cost of carrying away and piling on the quay on the ground of custom. Similar questions came before the President in the Admiralty Court in the case of *The Rensfjell.* (5) The President said: "The stage of the

(1) [1922] 1 A. C. 397, 415.
(2) Times Newspaper, May 11, 1877.
(3) [1892] P. 411.
(4) 40 Times L. R. 11.
(5) 40 Times L. R. 458, 462.

operation at which the shipowner is properly to be held to have completed his part of the discharge of the cargo is that at which timber landed by means of the wire sling is put at the disposal of the receiver by the loosing of the sling." In some of the cases then in question the shipowners had acquiesced in the unlading from the ship of the timber by shore cranes, which had a wider radius of swing than the ship's tackle. An attempt was made to distinguish these authorities in the case of *W. N. Hillas & Co.* v. *Rederi Aktiebolaget Aeolus* (1), where under similar words of contract it was sought to enforce against the shipowner a custom requiring him to pay the expense of carrying the timber cargo to bogies on rails 18 feet from the ship, which was lying against the quay, and of building for that purpose part of the cargo into a platform between the ship's side and the line of rails. Lord Cave L.C. held that that claim failed. As further illustrating the meaning of the word "alongside" I may refer to the case of *Northmoor Steamship Co.* v. *Harland & Wolff, Ld.* (2), where the Court was of opinion that the heavy logs of timber which had to be shoved into the water off the ship were "alongside" when at the place in the water into which they had been shoved from the ship.

I deduce from these authorities the conclusion that the cargo is "alongside" when it is available for release or is released from the ship's slings if discharged by the ship's tackle and if discharged, as was the first portion of the deck cargo in this case, by being handed from the vessel, when it is laid with one end on the quay and the other resting against the ship. It is from this point, in the case of cargo landed on quay, that, in my judgment, the obligation of the receiver to "take from alongside" begins, and therefore all expense from that moment is expense which by the contract the receiver has agreed to bear.

Mr. Jowitt, however, has contended that that is not the true conclusion. He distinguishes the cases of *The Turid* (3);

(1) 32 Com. Cas. 69; 96 L. J. (K. B.) 186.

(2) [1903] 2 I. R. 657.

(3) [1922] 1 A. C. 397.

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The Nifa (1); and *Holman* v. *Wade* (2), on the ground that in those cases the ship was some way from the quay, so that the intervening space of water had to be bridged, and, furthermore, that the edge of the pile nearest the ship was some distance away from the quay edge. He also seeks to distinguish the cases before the President of the Admiralty Court where the ship lay alongside, on the ground that the pile began 4 feet from the edge of the quay, and the case of *W. N. Hillas & Co., Ld.* v. *Rederi Aktiebolaget Aeolus* (3), on the ground that the bogie rails were 18 feet from the edge of the quay, and some cargo had to be laid on that intervening space. It is, however, clear from those cases that the mere fact that the ship is not alongside the quay is immaterial, and I think the whole area of the timber pile has to be taken into account and not merely the extreme edge nearest the ship. In this case the area extends at least 30 feet from the ship's side. I do not agree that the limit of the area remote from the ship is immaterial, and I do not accept Mr. Jowitt's contention that the cargo is to be visualized as if it were lifted from the ship in one piece and put down in one piece, so that the whole area it covered when so deposited could be regarded as alongside the ship because it was as near as it could be. This argument is, I think, not in accordance with the facts. Nor can the result, in my judgment, be different where, as here, the defendants as receivers took, not the whole cargo, but only about one-half. The customary mode of discharge on to quay is to discharge without sorting and the location of the defendants' portion is unascertained.

I think that in a question of general mercantile importance such as this, which involves the application, to conditions which for practical purposes are similar, of a common form of words in a common shipping document, it is desirable to attain to a clear and uniform rule. Lord Cave L.C. said in the case of *W. N. Hillas & Co.* v. *Rederi Aktiebolaget Aeolus* (4): "Where the meaning of a commercial document in common use has been the subject of judicial decision, it is

(1) [1892] P. 411.
(2) Times Newspaper, May 11, 1877.
(3) 32 Com. Cas. 69.
(4) 32 Com. Cas. 69, 71.

plainly undesirable in construing a similar document to draw fine distinctions." I think that in such a case as the present of discharge on to quay the fair result of the authorities is that the shipowner has delivered alongside when the deals are released or are ready for release from the ship's tackle or are laid on the quay, and that the subsequent expense of carrying, arranging and piling in the rough stack falls by contract on the defendants.

Now the question of delivery into lighters is somewhat different, and has been the subject of a separate line of case. Mr. Le Quesne has argued that on the principles which he argues should on the authorities be applied to discharge on quay, and which I have held should be applied, the shipowner's obligation is completed when the deals have been handed down from the ship and put on the lighter, or, if discharge is by the ship's tackle, once the sling is released so that the deals fall inside the lighter, and that any arrangement, or, alternatively, any such stowage as the custom alleged here requires into the lighter, is for the receivers' expense as a taking away from alongside, just as much as stowing in a truck or piling on the quay has been held in the cases referred to above to be for the receivers' account. It has, however, been held in the case of *Aktieselkab Helios* v. *Ekman & Co.* (1), under the same words of contract, that a custom was binding which required the shipowner to place the timber into lighters. Apart from custom, the placing into lighters would be a joint operation, requiring the receivers to have their men in the lighter to take the goods as soon as they are within their reach: see the cases of *Petersen* v. *Freebody & Co.* (2) and *Brenda Steamship Co., Ld.* v. *Green.* (3) As Chitty L.J. said in *Aktieselkab Helios* v. *Ekman & Co.* (1) of the facts in that case: "The custom merely diminishes the obligation of the merchants to this extent, namely, that the timber coming over the ship's side is to be put on board the lighter by the ship's crew. When that operation has been performed, it is the duty of the

(1) [1897] 2 Q. B. 83, 92. (2) [1895] 2 Q. B. 294.
(3) [1900] 1 Q. B. 518.

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merchants, in accordance with the charterparty, to take from alongside the cargo thus delivered." This is an authority binding me and fatal to Mr. Le Quesne's contention that the shipowner's part must cease when the timber is released from the sling. But the custom found in that case and said to be not inconsistent with the charterparty was to put the timber into lighters "in such a way and to such an extent as that the lighters may fairly be deemed to be loaded." In the case of *Glasgow Navigation Co.* v. *Howard Brothers & Co.* (1) the custom now relied on was given effect to by Hamilton J. But Mr. Le Quesne points out that in that case no point was raised such as he now raises, that such a custom is inconsistent with the contract, as putting on the ship the obligation of stowing or trimming in the manner described, which he contended was an operation and expense after the ship's delivery had ceased and appertained to the receivers' obligation to take away. It is true that in that case it was not pleaded that the custom was inconsistent with the contract, nor is any direct reference made to the question in the judgment. Hamilton J. points out (2) the difficulty of having two sets of men in the lighter, one set being the ship's men engaged in placing the deals in the lighter, the other the receivers' men engaged in the extra nicety of trimming, and the evidence here shows that the operation of loading the lighter is treated as a single operation done in the way necessary to render the lighter seaworthy and able to carry the deals without capsizing or throwing them overboard. In *The Turid* (3) Lord Sumner speaks of the lighter as an apparatus of reception which is alongside, so also does Lord Birkenhead L.C. (4), who refers to the *Glasgow* case (1) without disapproval, and thus explains it: "It is apparent, therefore, that the matter in controversy in the case was not that now under debate before your Lordships, but to a large extent, as the learned judge said, the controversy was what was included in the word 'discharging' used in the documents," and in *W. N. Hillas & Co.* v. *Rederi Aktiebolaget Aeolus* (5)

(1) 15 Com. Cas. 88; 102 L. T. 172.
(2) 15 Com. Cas. 88, 99; 102 L. T. 172.
(3) [1922] 1 A. C. 397, 415.
(4) Ibid. 411.
(5) 32 Com. Cas. 59, 64.

Scrutton L.J. seems to treat the decision of Hamilton J. in the *Glasgow* case (1) as a decision that the custom was binding under the charterparty. If the lighter which is touching the steamer is treated as alongside, and the custom requires the steamer to discharge by placing the planks in the lighter, and the receivers' duty is to take away the lighter with the planks in it from alongside, the custom may properly define what constitutes the complete act of delivery into the lighter, without contradicting the contract, because the custom then merely explains what is meant by delivery. This is, I think, the reason why, in *The Turid* (2), Lord Birkenhead L.C. describes this line of case as easily distinguishable from *The Turid* (2), and I accept it as being the correct conclusion. I accordingly hold that as regards delivery into lighters the receivers' contention is correct and that the shipowners fail.

I must refer to two other contentions of Mr. Jowitt's. He argued that the shipowners could not rely on the custom as to delivery on the quay, not according to bill of lading sizes and marks, unless they accepted the whole custom as alleged. But I think this is erroneous. The customary mode of discharge must not be confused with a custom as to the incidence of expense. He further contended that on any view the plaintiffs could not succeed, because they had paid the full expenses with express knowledge that the defendants refused to pay, and could not recover either as for damages for breach of contract or as for money paid at the implied request of the defendants. I think this contention is ill-founded. I have referred in this judgment to numerous cases where such claims as are here made have succeeded. In *The Turid* (3) Lord Birkenhead L.C. states the claim there as being to recover damages for breach of charterparty, or, alternatively, as money paid at the defendants' request. Indeed, by the express terms of the contract the receivers have promised that the expense of taking from alongside shall fall on them, and *Fletcher* v. *Gillespie* (4) is an express authority for a claim in a similar case, as on an implied request

(1) 15 Com. Cas. 88, 99; 102 L. T. 172.
(2) [1922] 1 A. C. 397.
(3) [1922] 1 A. C. 400.
(4) 3 Bing. 635.

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" for money paid in ease and for the benefit of the defendant." Mr. Jowitt relied on *Aktieselskabet Dampskibs Steinstad* v. *Pearson & Co.* (1), but there payment was purely voluntary; here the documents show a protest by the plaintiffs, and there the shipowners did the extra work at their own cost, at their full volition, whereas here the plaintiffs did so because the defendants repudiated the obligation. Mr. Jowitt also relied on observations by Hamilton J. in the *Glasgow* case (2), which are reported only in the report of that case in the Law Times Reports. But I have carefully considered these observations, and find nothing in them to affect my conclusion on this point.

In the result the plaintiffs will succeed in that part of their claim which relates to the expense of delivery on to quay, and fail on that part which relates to delivery into lighters. It is not questioned that the expenses are apportionable, but I am relieved from deciding any question of figures.

Judgment accordingly.

J. R.

The defendants appealed, and the plaintiffs cross-appealed. The appeals were heard on June 5 and 6.

Raeburn K.C. and *James Dickinson* for the defendants. The gist of Wright J.'s judgment as to delivery on the quay is contained in these words: " I deduce from these authorities the conclusion that the cargo is ' alongside ' when it is available for release or is released from the ship's slings if discharged by the ship's tackle and if discharged, as was the first portion of the deck cargo in this case, by being handed from the vessel, when it is laid with one end on the quay and the other resting against the ship. It is from this point, in the case of cargo landed on quay, that, in my judgment, the obligation of the receiver to ' take from alongside ' begins, and therefore all expense from that moment is expense which by the contract the receiver has agreed to bear." The authorities, when examined, do not warrant this deduction. Timber which is resting on the ship's rail is not " alongside."

(1) 43 Times L. R. 531. (2) 102 L. T. 172.

The custom of the Port of London obliges the shipowner not only to unloose the slings but to take the timber out of the slings and lay it on the quay in tiers, and there is no inconsistency between that custom and the provision of the charterparty. In *The Turid* (1) the custom of the port of Yarmouth was that a wooden staging should be erected between the ship and the quay, and that stevedores employed on behalf of the shipowners and at their expense should carry the cargo from the ship's rail over the staging and dump the same on the quay at not less than 10 feet from the quay edge. The House of Lords held that such a custom was inconsistent with the provision of the charterparty that the cargo should be taken from alongside the steamer at the charterer's expense. Lord Sumner there said that the word "alongside" might be satisfied although the apparatus of reception—barge or cart—was not in actual contact with the ship's side, but that the spot where the cargo was dumped was too far from the ship's side to come within the word "alongside." The position was the same in *Hillas & Co.* v. *Rederi Aktiebolaget Aeolus* (*The Oresund*) (2); and in *Aktieselskabet Dampsskibsselskabet Primula* v. *Horsley & Co.* (3) Those cases are clearly distinguishable from the present, where the timber was placed on the quay close up to the side of the ship. We submit therefore that Wright J. was wrong on this part of the case, but that he was right as to the shipowners' obligation as to discharge into lighters.

[They cited on the latter point *Petersen* v. *Freebody & Co.* (4); *Aktieselkab Helios* v. *Ekman & Co.* (5); and *Glasgow Navigation Co.* v. *Howard Brothers & Co.* (6)]

Le Quesne K.C. and *Sir Robert Aske* for the plaintiffs. The custom relied upon by the defendants is inconsistent with the terms of the charterparty, under which the shipowners, so far as discharge on to the quay is concerned, are obliged merely to put the cargo over the rail. Having done that, they have done all that they are bound to do. This view

(1) [1922] 1 A. C. 397.
(2) 32 Com. Cas. 69.
(3) 40 Times L. R. 11.
(4) [1895] 2 Q. B. 294.
(5) [1897] 2 Q. B. 83.
(6) 15 Com. Cas. 88.

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is justified by the authorities: see per A. L. Smith J. in *The Nifa* (1); *Brenda Steamship Co.* v. *Green* (2); *Northmoor Steamship Co.* v. *Harland & Wolff.* (3) In *The Turid* (4) Lord Sumner's reference to *The Nifa* (1) shows that he approved it as deciding that a custom imposing on the shipowner the cost of doing something after the cargo is clear of the ship is inconsistent with a charterparty in the same terms as that in this case. *Aktieselkab Helios* v. *Ekman & Co.* (5) does not decide that the shipowner has to bear the cost of handling the cargo after it has left the slings. See also *The Rensfjell* (6) and *Hillas & Co.* v. *Rederi Aktiebolaget Aeolus* (*The Oresund*) (7), which support the view on this point taken by Wright J. that the plaintiffs' obligation was satisfied when the cargo was available for release from the steamer's tackle.

With regard to discharge into lighters, there is nothing in the authorities to justify Wright J.'s conclusion. All that was really decided in *Aktieselkab Helios* v. *Ekman & Co.* (5) was who should provide men for the barges; it is no authority for the proposition that a custom compelling the shipowner to stow the cargo in a barge does not contradict a charterparty couched in the terms of the present charterparty. If that case decided that the shipowner was bound to stow the cargo in barges it is inconsistent with what was said in *The Turid.* (4) In *Glasgow Navigation Co.* v. *Howard Brothers & Co.* (8) the question whether the custom there proved was inconsistent with a charter in terms similar to those in the present case was not considered.

Raeburn K.C. replied.

Cur. adv. vult.

June 15. The following judgments were read :—

SCRUTTON L.J. This is an appeal in a test case intended to raise the question of the proper distribution of the costs

(1) [1892] P. 411, 418.
(2) [1900] 1 Q. B. 518.
(3) [1903] 2 I. R. 657.
(4) [1922] 1 A. C. 397.
(5) [1897] 2 Q. B. 83.
(6) (1924) 40 Times L. R. 458.
(7) 32 Com. Cas. 69.
(8) 15 Com. Cas. 88.

of discharging timber in the Surrey Commercial Dock, London, as between shipowner and receiver. The steamship *Fernhill* was chartered in 1926 in the well known Merblanc (White Sea) charter form, which has been in existence since 1899. The material terms are that "the ship shall load a full and complete cargo of deals and/or battens and/or ends, etc., and proceed to a safe port [which was ultimately fixed as London] and there deliver the same. Cargo to be discharged with customary steamship dispatch, but according to the custom of the respective ports. The cargo to be brought to and taken from alongside the steamer at charterer's risk and expense, as customary." The *Fernhill* carried timber cargo under sixty-three bills of lading, thirty-one of which were held by the present defendants. These bills only identified the subject-matter by number of pieces and sizes, not by marks. The goods shipped under each bill were separated on ship by a paint line, and a painted number, corresponding to the number of the bill of lading. But one batten of a given size is as good as another, and after the goods passed the ship's rail no attempt was made to keep them separate. So long as the receiver got his number of pieces of the right sizes, all was well. Timber goods at the Surrey Commercial Dock are discharged in two ways: (1.) on to quay; (2.) over side into lighters. As regards lighters, there has been litigation both before and after the Merblanc charter as to the amount of work the shipowner must do in the barge by way of discharge or delivery at his own expense. As regards the quay, the discharge or delivery has proceeded on an agreed custom during all the time the Merblanc charter has been in existence, the shipowner doing a recognized amount of work at his own expense, and, until the present case, no attempt has been made to disturb this custom or to impose less work on the shipowner, or alter the way in which by the custom of London the shipowner delivers or discharges or the cost of such work. The present attempt is made in consequence of a decision of the House of Lords in *The Turid* (1) in respect of timber discharge in

(1) [1922] 1 A. C. 397.

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the port of Yarmouth, followed by a similar decision as to the port of Hull in *Hillas & Co.* v. *Rederi Aktiebolaget Aeolus* (*The Oresund*). (1) The question is whether the facts of the discharge in London render these decisions applicable or not, and whether the agreed customs of the Port of London are excluded by the terms of the Merblanc charter in that they contradict these terms. Discharge of timber cargoes in London under the Merblanc charter has proceeded, so far as discharge on the quay is concerned, in accordance with the custom, for over twenty-five years without objection. The question is whether the decisions of the House of Lords in *The Turid* (2) and *The Oresund* (1) compel an alteration of this old established practice. Wright J. has decided that the practice of discharge on the quay is to be altered as regards incidence of expense, and the receiver appeals. He has also decided that the practice of discharge into lighters is not to be altered as to incidence of expense, and the ship appeals.

The respective customs for quay and lighter discharge in London are agreed, reserving the question of their applicability in law to the Merblanc charter. In practice they have always been treated as applicable to that charter until this case.

The agreed custom as to the quay discharge is set out in the correspondence and in Wright J.'s judgment. In substance it amounts to this: Though the goods in the ship are stored in separate parcels and leave the ship in separate parcels, they are not delivered to the receivers in separate parcels from the ship or sorted on the quay to sizes, marks or parcels. Largely for the convenience of the ship and to avoid delay, the whole cargo for the quay is discharged continuously on to the quay by the ship's gang and stacked on the quay by the ship's gang into two large stacks, one opposite the forward holds, one opposite the after holds. These stacks come up to the edge of the quay, and project over it towards the ship some three to five feet. The timbers are of considerable lengths. In the bill of lading given me,

(1) 32 Com. Cas. 69. (2) [1922] 1 A. C. 397.

out of 1783 pieces, 688 range from 20 to 27 feet in length. They are at first handed out and rest one end on the quay and the other end on the ship's rail, for the convenience of the workmen on the quay lifting them. When the ship's winches are clear the timbers are lowered in slings, the distance of the lowering place from the edge of the quay being about three feet, and again rest at an angle on the ship's side. The ship's gang then build them up into a stack, which may go back 30 feet from the edge of the quay, of which it will be seen 25 feet may be one piece at right angles to the ship. The stack will extend the whole length of the ship, except for the central gangway, and may be 12 to 15 feet high. It could be made higher and narrower, so extending less far back on the quay, but would in that case be less convenient to work. The whole cargo is thus discharged at once on to the quay, and stacked with one side of the stack almost touching the ship, by the ship's gang at the ship's expense. The ship has then finished with the cargo, and the Port of London Authority for the receivers, and at their expense, removes it to sheds, sorts it to sizes, and delivers it to individual receivers. This customary method of delivering on quay has prevailed for many years without objection under charters under which the receiver is bound to take from alongside at his risk and expense.

In respect of lighters the custom which is agreed in this case has been proved in actual cases, and will be found in the judgment and in para. 6 of the defence. The lighters receive the bill of lading parcels, quantities and marks. The receiver provides the lighters, but no men to receive the cargo. The ship's men at the ship's expense hand or lower the timber in slings into the lighters. Releasing the slings, they move and stow the timber so as to fill the lighters with reasonable stowage. The receiver has nothing to do with the matter until the barge is loaded, when he takes it away.

Apart from authority, I should have held that these customs defined the duty of discharge or delivery at the port which the shipowner had contracted to perform; that the stack and the barge were respectively "alongside" the ship, and

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that the receiver had only to remove the stack or barge when completely erected or loaded alongside. The custom seems to me an eminently reasonable and businesslike arrangement, as is evidenced by its working without objection for so many years. It enables the ship to be quickly discharged; it avoids friction and delay by two different gangs of men working in a confined space, and by numbers of receivers each coming, or delaying to come, to receive their parcels.

It is said, however, that the decisions of the House of Lords in *The Turid* (1) and *The Oresund* (2) have disturbed this working arrangement. I take those decisions to lay down that the ship cannot be compelled to bear the expense of work in removing cargo to a place which is not "alongside" in the ordinary meaning of that term, and that custom is not available to make such a place "alongside." I should myself have held differently, and should have thought that the custom of the port could make a place "alongside" which was not ordinarily "alongside," just as custom can make twelve mean thirteen, or a hundred mean a hundred and twenty. But it is clear from the decision of the House of Lords that I was wrong in that view. It remains, therefore, to ascertain what facts the House of Lords was considering when it held that such facts could not be made "alongside" by custom.

The import of timber into the port of Yarmouth has given rise to a great deal of litigation: see *The Nifa* (3) and *The Turid* (1) and a number of county court cases. Any one who has seen the Yarmouth river will understand why. The banks of the river slope so that the ship cannot lie near the bank and remain afloat, and cargo may not be deposited on the edge of the quay or bank. The result is that a considerable stretch of water and then of land intervenes between the ship's rail and the first place where the cargo can be deposited. In *The Nifa* (3) there was 15 feet between the ship's rail and the quay edge, and 15 to 20 feet from the edge of the quay to the first place where the cargo could be stacked; 30 to

(1) [1922] 1 A. C. 397. (2) 32 Com. Cas. 69.
(3) [1892] P. 411.

35 feet had to be traversed from the ship's rail to the cargo stack. In *The Turid* (1) the distance was 22 to 23 feet. The custom of Yarmouth proposed to put the expense of bridging this by a stage, and a gang carrying over it, on the ship. The House of Lords, as I understand the decision, has held that a place at such a distance from the ship cannot be " alongside " it, and custom is not admissible to extend the meaning of the word " alongside " to such a state of facts. The position at Hull is rather more severe on the ship ; a distance which may be from 30 feet to 60 feet has to be covered before the cargo is placed upon bogies or near to the railway line on which the bogies run, and the custom of Hull proposes to put the cost of bridging this space on the shipowner. Again I understand the House of Lords to have decided that a space 30 to 60 feet off cannot be " alongside " the steamer or be made so by custom. Following these decisions, in *Aktieselskabet Dampsskibsselskabet Primula* v. *Horsley & Co.* (2), relating to Sunderland, when the shore crane with a very wide range discharged on to a railway line, and then the goods were moved still further off, sometimes up to 87 feet from the ship, it was held that this again could not be " alongside " the ship, even by custom. In a similar case relating to West Hartlepool and Sunderland no custom was proved, but no timber was stacked within 4 feet of the edge of the quay and the stacks went back 40 or 50 feet from this 4 feet.

The difference in London, where a custom is admitted, is that the stack begins quite close to the ship's side overhanging the edge of the quay, and extends back 30 feet, being a little more than the length of timbers which are delivered by the custom at right angles to the ship's side, and which, therefore, when entirely clear of the ship's rail reach nearly to the end of the stack. I see no difficulty in holding that such a stack of which one edge almost touches the ship, and which leaves no space of land, and no appreciable space of water between the ship's side and the edge of the stack, is " alongside " the ship without any extension of the term " alongside " by

(1) [1922] 1 A. C. 397. (2) 40 Times L. R. 11.

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custom. I understood the objection of the shipowner was not to his gang's doing the work, which was obviously very convenient to him, but to his bearing the expense of it. Indeed, as I have said, he had been both doing the work and bearing the expense of it for twenty-five years under this charter without objection. There has been litigation in London as to the discharge into lighters overside and the work to be done by the shipowner. In 1895 in *Petersen* v. *Freebody & Co.* (1) no custom of the port was proved, and it was held that the receiving of logs of timber was a joint operation: the shipowner must put the end of the log so that the receiver could get hold of it, and the receiver must then help the ship to get the log out of the ship and into the lighter. The "alongside" clause was in the charter.

In 1897 in *Aktieselkab Helios* v. *Ekman & Co.* (2), where also there was an "alongside" clause in the charter, a custom was proved that the receivers need have no men in the barge, but that the shipowner was bound to have men there to release the slings and stow the barges, though the exact extent of the stowage was not determined. The custom was upheld, as explaining the customary mode of delivery which the shipowner had to perform.

In 1910 in *Glasgow Navigation Co.* v. *Howard Bros. & Co.* (3) the custom was further defined, after an exhaustive hearing of witnesses. The shipowner was held bound to do the whole work of stowing the barge to a reasonable extent, the receiver not being required to have any men in the barge. When the barge provided by the receiver is stowed fully, the receiver takes it away. The barge is alongside and all the timber in it is treated as alongside, though the shipowner has to move it after the slings are released. All these cases were cited to the House of Lords in *The Turid* (4), and were treated as distinguishable and as explaining the customary method of discharge or delivery.

Under these circumstances the learned judge below has declined to interfere with decisions which the House of Lords

(1) [1895] 2 Q. B. 294.
(2) [1897] 2 Q. B. 83.
(3) 15 Com. Cas. 88.
(4) [1922] 1 A. C. 397.

has treated as not affected by their decision in *The Turid* (1) and has dismissed the claim of the shipowner to recover the expenses of his work in the barge. I agree with this decision and am not disposed to interfere with a custom, which the House of Lords has not treated as affected by their decision, and which is quite explicable as defining what the ship must by custom do to deliver or discharge in the Port of London in a barge which is alongside the ship.

But the learned judge has thought himself bound by the decision of the House of Lords to interfere with the long established practice of delivery on to the quay in the Port of London, which has never before been questioned under this charter, though delivery into lighters has been questioned.

The judge has decided that the receiver must bear the cost of work on the quay, after the timber is within the consignee's reach in the ship's slings. I am not sure that he has decided who is bound to do the work, only who is to pay for the work ; and I think the shipowner rather wants to do the work, in order to release his ship more quickly.

Counsel for the shipowners at once argue that the two decisions of the judge are inconsistent. If the ship need not pay for the work on the quay after the timber is slung over board, why need it pay for the work in the barge after the timber is lowered into the barge in slings ? I think the two decisions are inconsistent, but that the result is that the decision as to work on the quay cannot stand. Both the timber in the barge and the timber on the quay are, in my opinion, in London " alongside " the ship. One side of the barge is some way from the ship, but the other is touching the ship ; the same is true of the stack. The work to be done by the ship appears to me to be on the quay, as it has been held to be in the barge, explained by the customary method of delivery or discharge in London.

Under these circumstances, in my opinion the decision below as to work on the quay must be reversed ; the custom of London held applicable to the Merblanc charter, and the

(1) [1922] 1 A. C. 397.

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shipowner held bound to do the work specified in the custom at his own expense. I have the more satisfaction in coming to this conclusion, as it upholds the method in which shipowners and receivers have done work on the quay under this custom for over twenty-five years without objection, because I think it is a way of discharging the ship with businesslike advantages to both parties.

The cross-appeal of the ship must be dismissed with costs; the appeal of the receivers allowed, the judgment against them set aside, and judgment entered for them in the action with costs here and below.

GREER L.J. I agree that the defendants' appeal should be allowed, and the plaintiffs' cross-appeal dismissed, with the usual consequences as regards costs.

The facts of the case are fully stated by Wright J. in his judgment, and they have been conveniently summarized by Scrutton L.J. in the judgment which he has just read. The only fact to which I desire to call special attention is, that the relevant term of the charterparty incorporated in the bill of lading is a term that applies to the cargo as a whole, and not to each separate piece of wood that is lifted out of the hold of the ship. The words are: "The cargo to be brought to and taken from alongside the steamer at charterers' risk and expense as customary."

In *The Oresund* (*Rederi Aktiebolaget Aeolus* v. *Hillas & Co.* (1)), which was originally tried by me, and went through this Court to the House of Lords, I used these words in giving judgment (2): "To put the goods over the rail is thus the prima facie limit of the obligation of the ship to discharge and deliver the cargo. If there be nothing in the charterparty about the consignee taking from alongside, it may well be that a custom such as is alleged in this case might impose the further duty of delivery into bogies 18½ feet from the ship's side. It has been decided that the ship's obligations, even where there is an alongside clause, may be extended and the receiver's duties diminished by an established custom

(1) 30 Com. Cas. 271; 32 Com. Cas. 69. (2) 30 Com. Cas. 278.

of the port: *Aktieselkab Helios* v. *Ekman* (1); and *Glasgow Navigation Co.* v. *Howard* (2), so long as the added duties of the ship are being performed while the goods are still alongside. But if the added duties of the ship imposed by the custom extend to taking the goods beyond a place that can properly be described as alongside, the custom is inconsistent with the contract made by the express words of the charter-party and is not binding on the parties to the contract." I see no reason to alter the view thus expressed as to the law applicable to cases like the present.

I think the point to be decided in the present case is whether, when the cargo had, in accordance with the custom of the port, been placed in a position extending from the quay edge to about 30 feet from the quay edge, it was still in a position that could reasonably be said to be "alongside" the ship? I think if any one had been asked where the cargo of the *Fernhill* was after discharge, he would not have been misusing the English language if he had said, as to the part on the quay, that it was alongside the ship on the quay, and as to the part discharged into lighters, it was alongside the ship in lighters. In my judgment this case, so far as it is concerned with the part of the cargo discharged on to the quay, is distinguishable from *The Turid* (3) on the ground that in that case no portion of the cargo was placed on the quay at a less distance than 8 yards from the rail of the ship. As Lord Sumner says in the concluding part of his judgment, 13 feet of water plus 10 feet of quay is too far away from the ship's side to be within the meaning of the words "alongside the steamer."

In the other case, *The Oresund* (4), from which I have already quoted, the custom involved the carriage of the whole of the cargo at least 18½ feet to the bogies, and loading it in the bogies, and it was held by all the Courts that when in the bogies at this distance from the ship's side the cargo could not be said to be "alongside the steamer."

(1) [1897] 2 Q. B. 83.
(2) 15 Com. Cas. 88.
(3) [1922] 1 A. C. 397.
(4) 30 Com. Cas. 271; 32 Com. Cas. 69.

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In my judgment the facts of this case take it outside the decisions of the House of Lords in the two cases referred to.

As regards the part of the cargo delivered into lighters, I agree with Scrutton L.J. that the case is within the decisions in *Aktieselkab Helios* v. *Ekman* (1) and *Glasgow Navigation Co.* v. *Howard* (2), and that the learned judge was right in his decision with regard to the cargo so delivered, but wrong in his decision with regard to the part delivered on the quay.

I only desire to add that I am not myself satisfied that there was any inconsistency between the decisions in *The Turid* (3) and *The Oresund* (4) and the cases where it has been held that the customary meaning of a dozen in a particular trade can be proved to be thirteen, and the customary meaning of 100 may be proved to be 120. Those are cases in which the customary meaning of a word was established, and, as pointed out in my judgment in *The Oresund* (4), and by the Lord Chancellor in the House of Lords, the attempt to prove a customary meaning to the word "alongside" entirely failed. It seems to me difficult to establish a customary meaning of the word "alongside" in a charterparty which involves the possibility of discharge at a variety of different ports, a customary meaning which will vary according to the port which may afterwards be selected as the port of discharge. The word "alongside" would then be like the sailor who is said to have a wife in every port. It would in effect be wedded to a different meaning with regard to each of the ports included in the words of the charterparty as the ports to which the charterer might order the vessel. In any event it is right to say that neither in *The Turid* (3) nor in *The Oresund* (4) was it proved that the word "alongside" in contracts of affreightment such as those involved in those cases had acquired a customary meaning.

With this qualification I agree with my Lord's judgment, not only as regards its findings, but also with the reasons given by him and the observations made in the course of his judgment.

(1) [1897] 2 Q. B. 83.
(2) 15 Com. Cas. 88.
(3) [1922] 1 A. C. 397.
(4) 30 Com. Cas. 271; 32 Com. Cas. 69.

SANKEY L.J. By the combined effect of thirty one bills of lading, dated on various dates from September 29 to October 14, 1926, and a charterparty dated September 13, the plaintiffs, as owners of the steamship *Fernhill*, agreed to deliver certain pieces of deals, battens and boards at the Surrey Commercial Docks, London, the charter providing that the cargo was to be brought to and taken from alongside the steamer at charterers' risk and expense, as customary.

The defendants were the indorsees of the said bills of lading and receivers of the cargo in question. I shall refer in the course of this judgment to the plaintiffs as the ship and the defendants as the receivers.

The vessel duly arrived at the Surrey Commercial Docks and moored alongside the quay, part of the cargo in question being discharged into lighters and part being discharged on to the quay.

There has been for many years a custom of the Port of London (Surrey Commercial Docks), which was agreed as follows, with regard to the discharge of wood goods on to the quay: The goods are discharged from the steamer by the ship's stevedores with the ship's tackle, and stacked by the stevedores on to the quay, without sorting to bill of lading sizes or marks—the first pieces discharged are used to make a stage projecting over the quay for about six feet towards the side of the steamer, and as the cargo is discharged a stack is made varying in size with the quantity discharged on to the quay, but generally not exceeding the length of the steamer and extending back about 30 feet from the edge of the stage. The timber is later carried away from the stack by the Port of London Authority, and by them sorted to bill of lading sizes and marks, and piled in the usual place for storing timber.

The ship's stevedores' charges for discharging the cargo and stacking it on the quay are paid by the shipowner, and the Port of London Authority's charges for carrying the cargo from the quay, sorting and piling, are paid by the consignees.

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With regard to the discharge into lighters, the custom was stated to be as set out in *Glasgow Navigation Co.* v. *Howard* (1): "By the custom and practice of the Port of London in the case of cargoes of lumber (including both Baltic and pitch pine lumber) the receiver, instead of being liable to receive the goods from the ship's tackle alongside into craft, is liable only to provide sufficient craft alongside ready to receive the goods, and is under no obligation to have any men thereon to receive the goods from the ship's tackle or to stow the goods therein, and the shipowner is bound to do the whole work of delivering the goods into barges, whether dock company's barges or outside barges, and of stowing the goods therein in the reasonable and ordinary manner, so that the goods may not be damaged or imperilled, and so that the barges may be loaded to the usual and reasonable extent and may be safely and properly navigable."

Disputes arose between the parties on the question whether the expense caused by these operations should fall upon the ship, or should fall upon the receivers. There have been a great number of cases before the Courts dealing with both these points, which may be conveniently classified as quay cases and barge cases. With regard to the quay cases there have been two recent decisions of the House of Lords—namely, *The Turid* (2) and *Hillas & Co., Ld.* v. *Rederi Aktiebolaget Aeolus* (*The Oresund*) (3), the former concerned with unloading at Yarmouth, the latter with unloading at Hull.

With regard to the barge cases, there have been several in connection with unloading in London, for example, *Petersen* v. *Freebody & Co.* (4); *Aktieselkab Helios* v. *Ekman & Co.*, (5); *Glasgow Navigation Co.* v. *Howard Bros. & Co.* (6) In this case the learned judge has decided that in respect of the discharge on to the quay, the cargo is alongside when it is available for release from the ship's slings, if

(1) 15 Com. Cas. 88, 89.
(2) [1922] 1 A. C. 397.
(3) 32 Com. Cas. 69.
(4) [1895] 2 Q. B. 294.
(5) [1897] 2 Q. B. 83.
(6) 15 Com. Cas. 88.

discharged by the ship's tackle, and if discharged, as was the first portion of the deck cargo in this case, by being handed from the vessel when it is laid with one end on the quay and the other resting against the ship. It is from this point he continues in his judgment that, in the case of cargo landed on the quay, the obligation of the receiver to take from alongside begins, and therefore all expense from that moment is expense which, by the contract, the receiver has to bear. From that part of the decision the receivers appeal.

In respect of the discharge into barges, the learned judge has decided that it is the duty of the ship to move the cargo and put and stow it into the barge, and that the ship must bear the expense of doing so. From that the ship appeals.

I now deal with both points. The transaction of loading or unloading a ship is a composite one, and is performed by a joint operation of the ship and the receiver; the one delivers and the other receives the cargo, and in respect of the delivery and the receiving the law imposes obligations upon the parties. The principles are, perhaps, best stated in Lord Esher's classic judgment in *Petersen* v. *Freebody & Co.* (1) Although, however, as an abstract question, his decision is simple, when it comes to practical matters difficulties arise. In many charters, as in this one, a duty is imposed upon the charterer to take the cargo from alongside at his own risk and expense, as customary. In some ports a vessel cannot get close to the quay, for example, at Yarmouth, she is moored at a distance of some feet from the quay: see *The Nifa* (2) and *The Turid.* (3) Again, in some ports the cargo is taken from the ship and placed on a spot a little distance from the edge of the quay, and questions have arisen, who is to bear the expense of carrying the cargo from the ship itself over an intervening space of water to the quay, and from the edge of the quay over an intervening space of land to the spot where it is usual to stack it. In many ports a custom has grown up with regard to this matter.

The decision in *The Turid* (3), the leading case of the quay cases, which dealt with the custom of the port of Yarmouth,

(1) [1895] 2 Q. B. 294. (2) [1892] P. 411.
(3) [1922] 1 A. C. 397.

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where the vessel could not come nearer than 13 feet out from the quay, was that, a custom imposing upon the shipowners the obligation of making a stage between the ship and the quay, then carrying the timber over that stage to the quay, and then over another space of about 10 feet between the edge of the quay and the spot where the timber was stacked, was invalid, as inconsistent with the provisions of the charterparty, which was in the same form as in the present case—namely, that the cargo should be taken from alongside the steamer at charterers' risk and expense.

It would not be profitable to go through all the other cases, as they are dealt with in the House of Lords in *The Turid* (1), which was approved in *The Oresund*. (2) As far as the quay discharge is concerned, in my opinion the question at stake here is whether, on the facts, the decision in *The Turid* (1) is applicable. It must be taken that the ratio decidendi of *The Turid* (1) was that you cannot have a custom to explain and so enlarge the meaning of the word "alongside." I think, however, that, before you apply the law you must consider carefully the facts.

At Yarmouth (*The Turid* (1)) the cargo has to be carried from the ship over a space of water to the quay side, and from the edge of the quay over a space of land to a place where it is stacked. At Hull (*The Oresund* (2)) it has to be carried over a space of land to the spot where it was stacked. These intervening spaces range between distances of 10 feet and 70 feet.

In the present case there is no such intervening space; the vessel is moored close to the quay, and although the cargo is discharged at first some little distance from the quayside, when the discharge is finally completed the stack composed of the cargo is lying, not only absolutely at the edge of the quay against which the ship is moored, but some of it projects over the ship's rail. There is, therefore, no intervening space, either of water or land, between the ship's rail and the place where the cargo, as a cargo, is placed. On the facts, therefore, this case is entirely different from *The Turid* (1),

(1) [1922] 1 A. C. 397. (2) 32 Com. Cas. 69.

and I can see no distinction between this case and the barge cases. The spot upon which the timber was unloaded in this case is comparable to the barge. It was actually alongside the steamer, as was the barge. No intervening space of water or of land, as was the fact in the quay cases, was between the ship and the unloading spot, just as there was no intervening space of water or land in the barge cases. I cannot see that the ship in this case had more to do than it was decided she was liable to do in the barge cases. Lord Sumner says in *The Turid* (1): "The fact is the steamer is the starting point. It is from her side that the extension is to be measured, which ultimately reaches the customary spot, and when that extension involves 13 feet of water, bridged by a staging, and at least 10 feet of quay, traversed by porters, I think the spot is too far away." That is not the fact in the present case.

For these reasons I am of opinion that the custom is not inconsistent with the terms of the charterparty, that it is valid, and that the appeal should be allowed, and I now turn to the question of the cross-appeal.

As far as the barge discharge is concerned, just as *The Turid* (2) is the leading case on the question of the quay delivery, so *Glasgow Navigation Co.* v. *Howard Bros. & Co.* (3) is the leading case on the question of barge delivery, although it must be remembered that in that case what was fought was the custom and not the point that the custom contradicted the charter. It was pointed out that in the decision of *Aktieselkab Helios* v. *Ekman & Co.* (4) the judgment did not apparently impose upon the shipowner a duty to stow the cargo in the barge, as distinguished from merely placing it there, and that the barge cases should be decided in the same way as the quay cases, but in my view the learned judge in the Court below was right in the conclusion he arrived at on this point.

The Lord Chancellor in *The Turid* (2) describes the barge cases as easily distinguishable from the quay cases, and the

(1) [1922] 1 A. C. 416.
(2) [1922] 1 A. C. 397.
(3) 15 Com. Cas. 88.
(4) [1897] 2 Q. B. 83.

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barge cases upon which the receivers rely and which are in their favour were all before the House of Lords in *The Turid* (1), and were not disapproved of.

In my view, if the barge cases are to be brought into a line with the decision in *The Turid* (1), in the way suggested by the learned counsel for the ship, that is a matter which must be determined by their Lordships' House.

I think the cross-appeal should be dismissed.

Appeal allowed.
Cross-appeal dismissed.

Solicitors for plaintiffs: *Botterell & Roche, for Botterell, Roche & Temperley, West Hartlepool.*

Solicitors for defendants: *William A. Crump & Son.*

(1) [1922] 1 A. C. 397.

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Shipping—General Average—Accident to Ship while in Dock—Ship not thereby endangered—Ship moved into Dock for Repairs—Incidental Expenses—Ship damaged while on Voyage—Ship rendered unfit thereby to encounter Perils of the Sea—Ship enters Port of Refuge for Repairs—Incidental Expenses—General Average Act—Liability of Underwriters for incidental Expenses—York-Antwerp Rules, 1924*—Construction.*

A ship was in the port of Bordeaux for the purpose of loading a cargo. While she was so engaged the foremast broke and fell on to the main deck doing damage, and in consequence of the breakage a derrick, which was attached to the foremast, fell into a hold and was damaged. The casualty was an accidental and fortuitous occurrence, and the ship was not in consequence thereof at any time in any danger. The ship was then moved into a wet dock for the purpose of repairs. After being repaired the ship proceeded on her voyage to her destination. While at sea she fouled some submerged wreckage and damaged the blades of her propeller, and was thereby rendered unfit to encounter the ordinary perils of the sea, and accordingly she put into Cherbourg for inspection and repairs, this being necessary for the common safety of the ship, cargo and freight. Both the charterparty and the policy of insurance in respect of the ship provided that average was to be adjusted according to the York-Antwerp Rules, 1924. A dispute arose between the shipowner and the underwriters with regard to liability for certain expenses incurred, and payments made by the owner in the ports of Bordeaux and Cherbourg in connection with the two casualties—namely, wages and provisions of master, officers and crew during the time the ship was being repaired; coal consumed in shifting the ship in and out of dock; handling cargo on board; discharging cargo; towage in and out of port, mooring expenses and port charges. The dispute was referred to arbitration, and the arbitrator held that none of these expenses were the subject of general average contribution, but stated a case for the opinion of the High Court:—

Held, (1.) that none of the above mentioned items of expenses incurred at the port of Bordeaux in connection with the first casualty came within Rules X., XI. or XX. of the York-Antwerp Rules, 1924, and therefore were not recoverable in general average, because they were not incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure, and Rule X. did not apply to a case of the repair of accidental damage and the shifting of cargo thereby caused where the ship was in no danger; (2.) but that the above mentioned items of expenses incurred at the port of Cherbourg in connection with the second casualty were recoverable in general average under Rules X. and XI., because they were expenses incurred for the common safety for the purpose of preserving from peril the property involved in the common maritime adventure.

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In order to justify a general average act, it is sufficient if the ship is in danger, or that the act must be done in order to preserve her from peril.

Per Roche J. The York-Antwerp Rules, 1924, are framed in order that the parties, if they choose to adopt the Rules by way of contract, may not be troubled with any question as to what, if any, general law is to apply. The Rules in the first place lay down the general principles which are to apply, and then deal with specific cases, not by way of mere illustration, but in order to make certain what the Rules provide with regard to those specific cases. The Rules must be read together and as a whole, and not as two codes one of which may contradict the other.

AWARD of an arbitrator stated in the form of a special case.

By a memorandum of agreement dated June 4, 1928, made between E. K. Vlassopoulos, of Ithaca, in the Kingdom of Greece (hereinafter called "the claimant") and the British and Foreign Marine Insurance Co., Ld. (hereinafter called "the respondents"), it was agreed that certain differences which had arisen between the parties concerning the liability for damage sustained, expenses incurred and payments made by the claimant should be referred to arbitration, and it was also agreed that as a number of similar questions were depending upon the result of the arbitration, the present differences between the parties should be regarded as in the nature of a test case, and that no costs should be awarded against either party. It was also agreed that if the arbitrator should decide that all or any of the said damage, expenses or payments were the subject of general average contributions he should award accordingly without reference to the figures or proportions involved.

The arbitrator at the request of the respondents stated his award in the form of a special case as follows :—

(1.) The claimant was at all material times the owner of the SS. *Makis*.

(2.) The respondents were at all material times underwriters of a policy of marine insurance on the hull and machinery of the SS. *Makis*, which policy was dated December 27, 1926, and was in favour of the claimant.

(3.) By the terms of the policy general average was to be adjusted according to the York-Antwerp Rules, 1924; and

it was agreed by the parties hereto that the York-Antwerp Rules, 1924, governed their rights and obligations.

(4.) By a contract of charter the claimant agreed with charterers that the SS. *Makis* should proceed with all reasonable dispatch to Bordeaux and there load a full and complete cargo of pitwood and deliver the same at Cardiff under charterers' orders.

(5.) The charterparty provided (inter alia) as follows: "17. Average, if any, shall be settled according to York-Antwerp Rules, 1924."

(6.) An agreed statement of fact was put in evidence before the arbitrator as follows :—

(*a*) The SS. *Makis* under the said charterparty proceeded on January 8, 1927, from Hamburg towards the port of Bordeaux, her port of loading, where she arrived at 4 A.M. on January 10, 1927.

First Casualty.

(*b*) At 10 A.M. on January 10, 1927, while loading of the cargo of pitwood was in progress, and in particular when a sling of pitwood was being lowered by means of ship's tackle into No. 2 hold, the foremast of the ship broke off about 8 ft. 2 in. above the main deck, and, falling on the port side of the bridge, did damage. A derrick was attached to the said foremast, and by reason of the said breakage fell into No. 2 hold, where it was damaged beyond repair.

(*c*) The said casualty was an accidental and fortuitous occurrence.

(*d*) At the order of the master the ship was moved into a wet dock (which was distinct from her loading dock) for the purpose of repairing the damage caused by casualty No. 1.

(*e*) The said wet dock was within the port of Bordeaux.

(*f*) The procedure ordered by the master, as mentioned in clause (*d*) hereof, and the repairs executed were necessary to enable the adventure, upon which the ship, cargo and freight were engaged, to be safely completed.

(*g*) The SS. *Makis* was duly moored in the said wet dock at 7 A.M. on January 16, 1927.

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(*h*) The SS. *Makis* was, during her stay in Bordeaux, at no time in danger.

(*i*) The damage was repaired by 7 A.M. on January 22, 1927.

(*j*) In order to enable the damage to be repaired some cargo had to be handled on board, part of which had also to be and was discharged.

(*k*) During the time occupied by repairs, which amounted to six days, the following expenses were incurred, and had been paid by the claimant :—

	£	*s.*	*d.*
1. Repairs	582	9	3
2. Wages and provisions of the master, officers and crew; 27 men at 12*l.* 19*s.* per day for six days	77	14	0
3. Coal consumed—			
Shifting into and out of dock 15 tons			
Six days under steam .. 25 ,,			
40 ,,			
at 20*s.* 4½*d.* per ton	40	15	0
4. Towage, boatmen, mooring and unmooring..	30	15	0
5. Handling cargo on board	150	0	0
6. Discharging cargo	350	15	0
7. Surveyor's fees and incidentals	72	0	0
	£1304	8	3

(*l*) Loading was finished at 10.30 A.M. on January 28, 1927, and the SS. *Makis* sailed from Bordeaux for Cardiff at noon on the same day.

Second Casualty.

(*m*) At 6.30 P.M. on January 29, 1927, when the SS. *Makis* was at sea, her propeller fouled some submerged wreckage or object, seriously damaging the blades thereof, and the ship was thereby rendered unfit to encounter the ordinary perils of the sea. The said damage was not due to any negligence on the part of those in charge of the SS. *Makis*.

(*n*) In consequence of the said damage the master of the SS. *Makis* decided to put into Cherbourg, where she was moored at 10 A.M. on January 30, 1927, and was subsequently placed on the same day in a wet dock in Cherbourg for inspection.

(*o*) Putting into Cherbourg was necessary for the common safety of the ship, cargo and freight, and the repairs effected at Cherbourg were necessary for the safe prosecution of the voyage.

(*p*) From the time of fouling the wreckage until arrival at Cherbourg and thereafter until repairs were completed neither the SS. *Makis* nor her cargo or freight was in fact in any immediate danger.

(*q*) As no dry dock was immediately available the surveyor (who was acting for both claimant and respondents), upon the diver's report, recommended that the vessel be tipped in wet dock (thereby necessitating the handling and discharge of some cargo) in order to effect the necessary repairs. This course was adopted, and a part of the vessel's cargo was handled on board, some of which had also to be, and was, discharged.

(*r*) During the time occupied by repairs at Cherbourg, which amounted to eighteen days, the following expenses were incurred, and had been paid by the claimant :—

	£	*s.*	*d.*
1. Repairs	1125	0	0
2. Wages and provisions of the master, officers and crew ; 27 men at 12*l.* 19*s.* per day for 18 days	233	2	0
3. Coal consumed : shifting into and out of dock, 30 tons, at 20*s.* 4½*d.* per ton	30	11	3
4. Handling cargo on board	45	10	0
5. Discharging cargo	57	12	0
6. Towage in	15	0	0
7. Port expenses, mooring charges, etc. ..	33	15	0
8. Towage outwards	15	0	0
9. Survey fees, etc.	36	0	0
	£1591	10	3

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(*s*) Repairs were completed by 5 P.M. on February 17, 1927, and the SS. *Makis* sailed for Cardiff at 6 P.M. the same day, and arrived there at 9 P.M. on February 20, 1927. Discharge was completed at noon on February 24, 1927.

(*t*) The place at which the adventure terminated was Cardiff.

(7.) It was contended on behalf of the claimant as follows :—

(*a*) In respect of items 1 and 7 of clause 6 (*k*) and items 1 and 9 of clause 6 (*r*) the claimant was entitled to full indemnity from the respondents.

(*b*) In respect of the remaining items of clause 6 (*k*) and clause 6 (*r*) the claimant was entitled, on the ground that the said remaining items formed the subject of general average, to payment from the respondents of the amount by which these expenses exceeded the contributions to which the claimant was entitled from the owners or underwriters of the cargo.

(8.) It was admitted on behalf of the respondents that they were liable in full for items 1 and 7 of clause 6 (*k*) and items 1 and 9 of clause 6 (*r*). It was however contended that the respondents were not liable in respect of the remaining items for their proportion or at all.

(9.) The arbitrator held, subject to the opinion of the Court, that none of the expenses mentioned in clauses 6 (*k*) and (*r*) hereof were the subject of general average contribution. And he awarded and determined that the respondents were liable to the claimant in respect of items 1 and 7 of clause 6 (*k*) and items 1 and 9 of clause 6 (*r*) only.

(10.) The question of law for the opinion of the Court was whether upon the agreed facts and upon the true construction of the York-Antwerp Rules, 1924, (1) and the contract between the parties the award was right in law.

(11.) If the Court was of opinion that the award was right in law then it should stand.

(12.) If the Court was of opinion that the award was wrong in law and that all or any of the said expenses were the subject of general average contribution, then the arbitrator awarded and determined that the respondents should pay to the

(1) See p. 202 below.

claimant the sums mentioned in items 1 and 7 of clause 6 (*k*) and items 1 and 9 of clause 6 (*r*) and his proportion of such of the other expenses as the Court should be of opinion were the subject of general average contribution. The respective proportions were already agreed between the parties.

(13.) In accordance with the agreement of reference the arbitrator awarded that each party should bear and pay their own costs of the arbitration, and that each party should bear half the costs of the award.

Sir Robert Aske for the claimant.

Langton K.C. and *F. M. Vaughan* for the respondents.

The arguments sufficiently appear from the judgment.

ROCHE J. The special case which comes before me for decision raises points of considerable interest and some novelty under the York-Antwerp Rules of 1924, (1) which, so far as I am aware, have not yet arisen for decision. A case which I decided in 1926, *Anglo-Grecian Steam Trading Co.* v. *T. Beynon & Co.* (2), was cited as having some bearing on this matter, and is reported as having been decided under the York-Antwerp Rules of 1924, but when the Rule, which is set out in the decision, and the dates are looked at, it appears that the case was really decided under the Rules of 1890. I make this observation in order to make it clear that that decision was not a decision upon the Rules of 1924.

The matter arises in the following way: A ship owned by the claimant, a shipowner, called the *Makis*, was loading pitprops in the port of Bordeaux. She had an accident there whilst loading, caused by the falling of a mast, and with it the derrick, upon the deck and into the hold. The ship had in consequence to be moved into a wet dock where the damage was repaired, and she was as a result delayed in the port of Bordeaux. The expenses of the repairs and all the consequential expenses that arose out of the delay and the necessity for repair are the subject-matter of what I may describe as the first claim in the arbitration. After that damage had been repaired the ship started on her voyage, and she met with a

(1) see p. 202 below. (2) (1926) 24 Ll. L. Rep. 122.

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second mishap, seriously damaging her propeller blades, and the ship was thereby rendered unsafe and unfit to encounter the ordinary perils of the sea. She therefore put into Cherbourg, which act was, as the arbitrator finds, necessary for the common safety of the ship, cargo and freight, and Cherbourg became what has been commonly and ordinarily called a port of refuge. The cost of the repairs there and all the consequential expenses of dealing with the cargo, the wages of the master and crew whilst detained in port, and the port expenses in and out, are the subject-matter of the second claim.

The matters submitted to the arbitrator seem to have been whether under a policy of insurance—which is referred to although not set out in the case—the various items under these two heads of claim were recoverable by the shipowner from the underwriters on hull. It must be assumed, although it is not stated, that the policy insured the assured and gave him a right to indemnity in respect of both particular and general average. It is certain that that must be so as to particular average, because the arbitrator has awarded the cost of repairs, and the surveys which were consequential upon the repair, as recoverable by the claimant from the underwriters, and they could only have been recoverable as a matter of particular average, because the arbitrator also finds that no general average was due. It is also clear from the special case that general average was recoverable under the policy, because para. 3 of the case states: "General average was to be adjusted according to York-Antwerp Rules, 1924, and it was agreed by the parties hereto that the York-Antwerp Rules, 1924, governed their rights and obligations." The arbitrator having found that the large items of repair and survey expenses were in both cases recoverable from the underwriters, and recoverable, as I have already stated, of necessity by way of particular average, it is not my function to decide whether some of the other items which the arbitrator has held not to be general average—and for that reason not to be recoverable—might or might not under some circumstances be recoverable as particular average. That question

is not submitted to me, and I cannot decide it. What I have to decide is whether the arbitrator was right or wrong in law in deciding that the other expenses were none of them the subject of general average contribution. I am going to hold substantially that all of those which arise out of the resort to the port of refuge, Cherbourg, are recoverable in general average, and I am going to hold substantially that none of those other items which arise out of the casualty at the port of loading, Bordeaux, are recoverable in general average. That is to say, I hold that the arbitrator was wrong as regards the Cherbourg items and that he was right as regards the Bordeaux items. I so hold for reasons which will appear from that part of my judgment which follows.

The York-Antwerp Rules, 1924, mark a new departure. Previously the Rules numbered I., II. and so forth, had dealt with specific matters and particular cases, and Rule XVIII. had constituted a general Rule. I am referring now to the Rules of 1890, but most of these observations apply also to the Rules which preceded those of 1890. Rule XVIII. of the Rules of 1890 provided as follows: "Except as provided in the foregoing rules, the adjustment shall be drawn up in accordance with the law and practice that would have governed the adjustment had the contract of affreightment not contained a clause to pay general average according to these rules." That is to say, where specific cases are dealt with in the Rules the Rules are to apply. Where there is no provision in the Rules then the contract of affreightment or the appropriate law is to govern the matter. In general the law of the port of destination, or of the port where the voyage is terminated, is the appropriate law. In the Rules of 1924 there is no such Rule as Rule XVIII.—which has disappeared—but the Rules begin with certain general principles which are enunciated under the name of Rules. They are not numbered, but lettered Rule A, B, C, and so forth—and they precede the numbered Rules, which begin as before with No. I. It is a difference of view as to the relation of the lettered rules to the numbered Rules which has given rise to the debate in the present case. In substance the argument for the

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underwriters with regard to Cherbourg, the port of refuge, was that there were no circumstances which brought the matter within the principles set out in the general or lettered Rules A and B, and that accordingly the specific references to the matter in the later numbered Rules, even though such references might, if they stood alone, be sufficient to bring these port of refuge expenses within the ambit of general average, do not have that effect, because otherwise it would be in contradiction of, or contrary to, the effect of the general rules. On the other hand the argument for the claimant was as follows: It was contended that although the general Rules would seem to prevent from being general average expenses, at any rate, the expenses at the port of loading, Bordeaux, yet a special Rule, No. X.—makes them general average expenses, and the particular must prevail over the general. This is a matter of construction, and in my view the true construction of these Rules, general and particular, is not precisely what either of the contending parties has contended for. In my view those who drew up the Rules intended to provide a complete code which is to govern the law of general average for anybody who adopts it. Whether those who have drawn up the Rules have succeeded in that endeavour it is not necessary for me to decide, and I do not decide. It may be that there are omitted cases not covered by the general or by the specific Rules. That I do not decide. Nor do I decide any question as to the law apart from the Rules, because there is a finding that the parties by their contract intended that the code which should govern their rights and obligations should be the York-Antwerp Rules of 1924, and I treat that as conclusive for the present purpose and the common law of this or any other country as being outside the scope of my consideration and my decision.

I can perhaps best explain the reasons for my decision with regard to the port of refuge, Cherbourg, by a specific case Mr. Langton has cited to me, the well known case of *Svendsen* v. *Wallace*. (1) Stated shortly, that case decided that certain expenses of leaving a port of refuge after repairs were

(1) (1885) 13 Q. B. D. 69; 10 App. Cas. 404.

completed and danger was over, would not, according to the law of England, be recoverable in general average. I have no doubt whatever that a contract to have general average adjusted in accordance with York-Antwerp Rules, which include such Rules as the present Rules X. and XI., would exclude by reason of its express terms the operation of the doctrine of law which is laid down in *Svendsen* v. *Wallace*. (1) But it is one thing by a contractual code to exclude the operation of the general law, it is quite another thing to say that one part of a code excludes the operation of another part. Both parts of the code are adopted by the contract between the parties and form not two codes but one code, and must be read as such. The two opposing arguments in my judgment are both erroneous, because they stress overmuch portions of the Rules without due regard to their meaning as a whole. Thus the argument put forward with great force by Sir Robert Aske in favour of allowing all items that can possibly be brought within the specific words of any Rule, even though to allow such items may be contrary both to the letter and the spirit of the general Rules, is really an argument that the Rules are to be construed as if they began by enacting that general average shall be recoverable in any case to which Rules I., II., III. and so forth apply, and had gone on to say : " And in addition to the above cases general average expenses shall be recoverable and general average sacrifices shall be deemed to have been made in cases which fall within the general words of Rules (A), (B), and so forth." That, I think, is not the language or order of the Rules ; and that is, in my judgment, not their meaning. The argument on the other side is that there is a strict definition of all possible cases of general average in the general Rules (A), (B), and so forth, and then mere illustrations of the applicability of those general rules in the numbered Rules I., II., III., etc. This also is not, in my opinion, the true construction of this code of Rules. In my judgment the true construction is this : that certain general Rules are laid down in order that if the parties choose to adopt the Rules by way of contract, as these parties have done, they may not be troubled thereafter by

(1) 13 Q. B. D. 69; 10 App. Cas. 404.

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questions which arise under the old Rule XVIII. as to what, if any, general law is to apply. They may have if they choose a self-contained code, and of this code, it may be observed, that although the general Rules are not identical with the law of England, they approach much more nearly to the law of England than they do to the laws of many other countries, and that is not perhaps surprising, having regard to the known and admitted predominance that this country holds in maritime matters. But when that has been done, and a general set of Rules provided laying down the general principles which are to operate, then the Rules go on to deal with certain specific cases, and I am satisfied on the true construction of the Rules that those cases are dealt with not by way of mere illustration, but in order to make definite and certain what the Rules decide about certain cases which are on the border line, and which might be held to be on one side or the other of the line which is to be drawn under the general Rules; such, for example, as arose in the case of *Svendsen* v. *Wallace*. (1) I have no doubt whatever that the intention of the framers of the Rules was to provide, as I have already said, that similar facts to those in *Svendsen* v. *Wallace* (1) should give rise to general average, but I am satisfied that it was not intended by reason of any particular Rule to contradict the provisions of the general Rules. It is, I think, as if the Rules had provided that Rules A, B, C and so forth constitute the general rules for general average, and then followed the words: "And in particular 1, 2, 3, 4" and so on, "are cases of general average."

That being my construction of the scope and meaning of the Rules it is only necessary to specify quite clearly what I find about the particular items in the present case, and why I so find, and to deal with one or two subsidiary matters that have arisen out of the findings of the arbitrator in this case. I hold with regard to Cherbourg, the port of refuge, that items 2, 3, 4, 5, 6, 7 and 8 are all within Rules X. (*a*), X. (*b*) and XI. I do not mean that each of the items is within every one of those Rules, but, taken together,

(1) 13 Q. B. D. 69; 10 App. Cas. 404.

they are covered by those Rules, and there is nothing in those items which is contrary to any general Rule, because there is an express finding of the arbitrator that when the ship's propeller was seriously damaged the ship was thereby rendered unfit to encounter the ordinary perils of the sea: and there is a further finding that putting into Cherbourg was necessary for the common safety of the ship, cargo and freight. Accordingly the consequent expenses, dealt with, as I have said, specifically under Rules X. and XI., were expenses which were, within the meaning of the General Rule A, incurred for the common safety for the purpose of preserving from peril the property involved in the common maritime adventure, or were, within Rule C, damages, losses or expenses which were the direct consequences of the general average act which took place when the master determined to proceed to the port of refuge.

The only special matter which has to be dealt with in this connection is that the arbitrator has found in para. 6 (*p*) in connection with the second casualty that neither the *Makis* nor her cargo or freight was in fact in any immediate danger. I suppose he had been asked to find that by the underwriters, and having made the finding he attributed some legal consequences to it, and it may be that is the reason why he has held that this is not general average. If that was his reason it is in my judgment erroneous in law. It is erroneous because it is to attach an unwarranted weight to the word "immediate." The earlier findings amount to this: that the ship was in the grip of danger. The finding in para. 6 (*p*) could only mean under those circumstances that the ship though in the grip of danger was not actually in the grip or nearly in the grip of a disaster that might result from the danger. That is not necessary in order to constitute a general average act. It is not necessary that the ship should be actually in the grip, or even nearly in the grip, of the disaster that may arise from a danger. It would be a very bad thing if shipmasters had to wait until that state of things arose in order to justify them doing an act which would be a general average act. That is all, I think, which need be

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said with regard to that matter, unless I add this: that "peril," which means the same thing as danger, is the word used in the General Rule A, just as it is the word used in the Marine Insurance Act, 1906, s. 66. The phrase is not "immediate peril or danger." It is sufficient to say that the ship must be in danger, or that the act must be done in order to preserve her from peril. It means, of course, that the peril must be real and not imaginary, that it must be substantial and not merely slight or nugatory. In short, it must be a real danger. The arbitrator has in my judgment found quite clearly that the vessel was unfit to encounter the ordinary perils of the sea, and that it was therefore necessary for her to put into Cherbourg for the common safety of the ship, cargo and freight. And that in my judgment ends that matter.

With regard to Bordeaux, I hold that none of the items 2 to 6 inclusive are within any part of Rules X. or XI. or XX., which were the Rules relied upon in order to justify the contentions that these were general average expenses. It it to be observed in passing that with regard to item 4 Sir Robert Aske, with all his ingenuity, had great difficulty in finding a Rule under which he could bring it, and I think it had to be conceded that there was no Rule under which he could bring that item. With regard to almost the whole of the items the argument for the claimant made by Sir Robert Aske depends upon the second half of Rule X. (*b*). That rule reads as follows: "The cost of handling on board or discharging cargo, fuel or stores, whether at a port or place of loading, call or refuge, shall be admitted as general average when the handling or discharge was necessary for the common safety or to enable damage to the ship caused by sacrifice or accident to be repaired, if the repairs were necessary for the safe prosecution of the voyage." No difficulty for discussion arises down to the words "necessary for the common safety." The difficulty arises with regard to the next words: "or to enable damage to the ship caused by sacrifice or accident to be repaired." The first part of the Rule provides for the case where it is necessary to handle or discharge cargo at any of the ports mentioned in order

to secure the common safety. The next case is where the handling of the cargo was necessary to enable damage to the ship to be repaired which had been caused by sacrifice—which means a general average sacrifice. That case is clear. A ship may be damaged in order to save the whole adventure, and in such case quite consistently with the general provisions of the general Rules the shifting and handling of the cargo is to be admitted as general average. Then it is said by Sir Robert Aske that the words, " or accident to be repaired," make the cost of handling or discharging cargo admissible in general average in all cases where the discharge and handling of the cargo is due to the necessity of repairing damage caused by accident, so long as the repairs are necessary for the safe prosecution of the voyage, even though there is no danger at all—and not merely no immediate danger—operating at any material times upon the ship or with regard to the adventure. That is where, I think, the argument breaks down and is too wide. I can conceive cases where, quite consistently with the general Rules, the handling of the cargo may be necessary to enable damage to the ship to be dealt with which has been due to an accident, as, for example, where there has been an accident and then a proper decision to resort to a port of refuge ; or I can conceive another case where there is a general average act or sacrifice as, for example, the working of the engines to get a ship off a bank, although such working is known to be dangerous, and an accident happens in the course of such operation. In other words, effect can be given to the whole of Rule X. (*b*), including the words " or accident," without making it apply to every repair of all accidentally caused damage. I think it would be a violation of the true meaning of the Rules to bring in repair of accidental damage and expenses of shifting cargo for that purpose where there has merely been an accident, and the ship is, as the arbitrator finds here, in no danger. Here the arbitrator has found in para. 6 (*h*) that the *Makis* was during her stay at Bordeaux at no time in danger. In those circumstances I do not regard any of those items as recoverable in general average. Putting it in another way, they are not

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within Rule A because the expenses were not incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure, and as to Rule X., to which I have referred, that can be given effect to without bringing within it any such case as this.

That I think covers the points.

The award to stand as regards items 1 *to* 7 *inclusive of para.* 6 (*k*), *and in respect of items* 1 *and* 9 *of para.* 6 (*r*). *The alternative award in para.* 12 *to take effect instead of items* 2 *to* 8 *inclusive of para.* 6 (*r*).

Solicitor for claimant: *R. A. Clyde.*

Solicitors for respondents: *Ince, Colt, Ince & Roscoe.*

R. F. S.

NOTE.

YORK-ANTWERP RULES, 1924.

Rule A.—There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure.

Rule B.—General average sacrifices and expenses shall be borne by the different contributing interests on the basis hereinafter provided.

Rule C.—Only such damages, losses or expenses which are the direct consequence of the general average act shall be allowed as general average.

Damage or loss sustained by the ship or cargo through delay on the voyage, and indirect loss from the same cause, such as demurrage and loss of market, shall not be admitted as general average.

Rule D.—Rights to contribution in general average shall not be affected though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure; but this shall not prejudice any remedies which may be open against that party for such fault.

Rule E.—The onus of proof is upon the party claiming in general average to show that the loss or expense claimed is properly allowable as general average.

Rule F.—Any extra expense incurred in place of another expense which would have been allowable as general average, shall be deemed to be general average and so allowed, but only up to the amount of the general average expense avoided.

Rule G.—General average shall be adjusted as regards both loss and contribution upon the basis of values at the time and place when and where the adventure ends.

This rule shall not affect the determination of the place at which the average statement is to be made up.

Rule I.—*Jettison of Cargo.*

No jettison of cargo shall be made as general average, unless such cargo is carried in accordance with the recognised custom of the trade.

Rule II.—*Damage by jettison and sacrifice for the common safety.*

Damage done to a ship and cargo, or either of them, by or in consequence of a sacrifice made for the common safety, and by water which goes down a ship's hatches opened or other opening made for the purpose of making a jettison for the common safety, shall be made good as general average.

Rule III.—*Extinguishing fire on shipboard.*

Damage done to a ship and cargo, or either of them, by water or otherwise, including damage by beaching or scuttling a burning ship, in extinguishing a fire on board the ship, shall be made good as general average; except that no compensation shall be made for damage to such portions of the ship and bulk cargo, or to such separate packages of cargo, as have been on fire.

Rule IV.—*Cutting away wreck.*

Loss or damage caused by cutting away the wreck or remains of spars, or of other things which have previously been carried away by sea-peril, shall not be made good as general average.

Rule V.—*Voluntary stranding.*

When a ship is intentionally run on shore, and the circumstances are such that if that course were not adopted she would inevitably drive on shore or on rocks, no loss or damage caused to the ship, cargo and freight or any of them by such intentional running on shore shall be made good as general average. But in all other cases where a ship is intentionally run on shore for the common safety, the consequent loss or damage shall be allowed as general average.

Rule VI.—*Carrying press of sail.—Damage to or loss of sails.*

Damage to or loss of sails and spars, or either of them, caused by forcing a ship off the ground or by driving her higher up the ground, for the common safety, shall be made good as general average; but where a ship is afloat, no loss or damage caused to the ship, cargo and freight, or any of them, by carrying a press of sail, shall be made good as general average.

Rule VII.—*Damage to engines in refloating a ship.*

Damage caused to machinery and boilers of a ship which is ashore and in a position of peril, in endeavouring to refloat, shall be allowed in general average, when shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage; but where a ship is afloat no loss or damage caused by working the machinery and boilers shall be made good as general average.

Rule VIII.—*Expenses lightening a ship when ashore, and consequent damage.*

When a ship is ashore and cargo and ship's fuel and stores or any of them are discharged as a general average act, the extra cost of lightening, lighter hire and reshipping (if incurred) and the loss or damage sustained thereby shall be admitted as general average.

Rule IX.—*Ship's materials and stores burnt for fuel.*

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Ship's materials, and stores, or any of them, necessarily burnt for fuel for the common safety at a time of peril, shall be admitted as general average, when and only when an ample supply of fuel had been provided; but the estimated quantity of fuel that would have been consumed calculated at the price current at the ship's last port of departure at the date of her leaving shall be credited to the general average.

Rule X. (*a*).—*Expenses at port of refuge, etc.*

When a ship shall have entered a port or place of refuge, or shall have returned to her port or place of loading, in consequence of accident, sacrifice, or other extraordinary circumstances, which render that necessary for the common safety, the expenses of entering such port or place shall be admitted as general average; and when she shall have sailed thence with her original cargo, or a part of it, the corresponding expenses of leaving such port or place consequent upon such entry or return shall likewise be admitted as general average.

Rule X. (*b*).

The cost of handling on board or discharging cargo, fuel or stores, whether at a port or place of loading, call or refuge, shall be admitted as general average when the handling or discharge was necessary for the common safety or to enable damage to the ship caused by sacrifice or accident to be repaired, if the repairs were necessary for the safe prosecution of the voyage.

Rule X. (*c*).

Whenever the cost of handling or discharging cargo, fuel or stores is admissible as general average, the cost of reloading and stowing such cargo, fuel or stores on board the ship, together with all storage charges (including fire insurance, if incurred) on such cargo, fuel or stores shall likewise be so admitted. But when the ship is condemned or does not proceed on her original vayage, no storage expenses incurred after the date of the ship's condemnation or of the abandonment of the voyage shall be admitted as general average. In the event of the condemnation of the ship or the abandonment of the voyage before completion of discharge of cargo, storage expenses, as above, shall be admitted as general average up to the date of completion of discharge.

Rule X. (*d*).

If a ship under average be in a port or place at which it is practicable to repair her, so as to enable her to carry on the whole cargo, and if, in order to to save expenses, either she is towed thence to some other port or place of repair, or to her destination, or the cargo or a portion of it is transhipped by another ship, or otherwise forwarded, then the extra cost of such towage, transhipment and forwarding, or any of them (up to the amount of the extra expense saved) shall be payable by the several parties to the adventure in proportion to the extraordinary expense saved.

Rule XI.—*Wages and maintenance of crew in port of refuge, etc.*

When a ship shall have entered or been detained in any port or place under the circumstances, or for the purposes of the repairs mentioned in Rule X., the wages payable to the master, officers and crew together with the cost of maintenance of the same, during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage, shall be admitted as general average. But when the ship is condemned or does not proceed on her original voyage, the wages and

maintenance of the master, officers and crew, incurred after the date of the ship's condemnation or of the abandonment of the voyage, shall not be admitted as general average.

In the event of the condemnation of the ship or the abandonment of the voyage before completion of discharge of cargo, wages and maintenance of crew, as above, shall be admitted as general average up to the date of completion of discharge.

Rule XII.—*Damage to cargo in discharging, etc.*

Damage to or loss of cargo, fuel or stores caused in the act of handling, discharging, storing, reloading and stowing shall be made good as general average, when and only when the cost of those measures respectively is admitted as general average.

Rule XIII.—*Deductions from cost of repairs.*

In adjusting claims for general average, repairs to be allowed in general average shall be subject to the following deductions in respect of "new for old," viz.:

. . . . . .

Rule XIV.—*Temporary repairs.*

Where temporary repairs are effected to a ship at a port of loading, call or refuge, for the common safety, or of damage caused by general average sacrifice, the cost of such repairs shall be admitted as general average; but where temporary repairs of accidental damage are effected merely to enable the adventure to be completed, the cost of such repairs shall be admitted as general average only up to the saving in expense which would have been incurred and allowed in general average had such repairs not been effected there.

No deductions "new for old" shall be made from the cost of temporary repairs allowable as general average.

Rule XV.—*Loss of freight.*

Loss of freight arising from damage to or loss of cargo shall be made good as general average, either when caused by a general average act, or when the damage to or loss of cargo is so made good.

Deduction shall be made from the amount of gross freight lost of the charges which the owner thereof would have incurred to earn such freight, but has, in consequence of the sacrifice, not incurred.

Rule XVI.—*Amount to be made good for cargo lost or damaged by sacrifice.*

The amount to be made good as general average for damage to or loss of goods sacrificed shall be the loss which the owner of the goods has sustained thereby, based on the market values at the date of the arrival of the vessel or at the termination of the adventure where this ends at a place other than the original destination.

Where goods so damaged are sold after arrival, the loss to be made good in general average shall be calculated by applying to the sound value on the date of arrival of the vessel the percentage of loss resulting from a comparison of the proceeds with the sound value on date of sale.

Rule XVII.—*Contributory values.*

The contribution to a general average shall be made upon the actual net values of the property at the termination of the adventure to which values shall be added the amount made good as general average for property sacrificed

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if not already included; deduction being made from the shipowner's freight and passage money at risk, of such charges and crew's wages as would not have been incurred in earning the freight had the ship and cargo been totally lost at the date of the general average act and have not been allowed as general average, deduction being also made from the value of the property of all charges incurred in respect thereof subsequently to the general average act, except such charges as are allowed in general average.

Passenger's luggage and personal effects not shipped under bill of lading shall not contribute in general average.

Rule XVIII.—*Damage to ship.*

The amount to be allowed as general average for damage or loss to the ship, her machinery and/or gear when repaired or replaced shall be the actual reasonable cost of repairing or replacing such damage or loss, deductions being made as above (Rule XIII.) when old material is replaced by new. When not repaired, the reasonable depreciation shall be allowed, not exceeding the estimated cost of repairs.

Where there is an actual or constructive total loss of the ship the amount to be allowed as general average for damage or loss to the ship caused by a general average act shall be the estimated sound value of the ship after deducting therefrom the estimated cost of repairing damage which is not general average and the proceeds of sale, if any.

Rule XIX.—*Undeclared or wrongly declared cargo.*

Damage or loss caused to goods loaded without the knowledge of the shipowner or his agent or to goods wilfully misdescribed at time of shipment shall not be allowed as general average, but such goods shall remain liable to contribute, if saved.

Damage or loss caused to goods which have been wrongfully declared on shipment at a value which is lower than their real value shall be contributed for at the declared value, but such goods shall contribute upon their actual value.

Rule XX.—*Expenses bearing up for port, etc.*

Fuel and stores consumed, and wages and maintenance of master, officers and crew incurred, during the prolongation of the voyage occasioned by a ship entering a port or place of refuge or returning to her port or place of loading shall be admitted as general average when the expenses of entering such port or place are allowable in general average in accordance with Rule X. (*a*).

Fuel and stores consumed during extra detention in a port or place of loading, call or refuge shall also be allowed in general average for the period during which wages and maintenance of master, officers and crew are allowed in terms of Rule XI., except such fuel and stores as are consumed in effecting repairs not allowable in general average.

Rule XXI.—*Provision of funds.*

A commission of 2 per cent. on general average disbursements shall be allowed in general average, but when the funds are not provided by any of the contributing interests, the necessary cost of obtaining the funds required by means of a bottomry bond or otherwise, or the loss sustained by owners of goods sold for the purpose, shall be allowed in general average.

The cost of insuring money advanced to pay for general average disbursements shall also be allowed in general average.

Rule XXII.—*Interest on losses made good in general average.*

Interest shall be allowed on expenditure, sacrifices and allowances charged to general average at the legal rate per annum prevailing at the final port of destination at which the adventure ends, or where there is no recognised legal rate, at the rate of 5 per cent. per annum, until the date of the general average statement, due allowance being made for any interim reimbursement from the contributory interests or from the general average deposit fund.

Rule XXIII.—*Treatment of cash deposits.*

Where cash deposits have been collected in respect of cargo's liability for general average, salvage or special charges, such deposits shall be paid into a special account, earning interest where possible, in the joint names of two trustees (one to be nominated on behalf of the shipowner and the other on behalf of the depositors) in a bank to be approved by such trustees. The sum so deposited, together with accrued interest, if any, shall be held as security for and upon trust for payment to the parties entitled thereto of the general average, salvage or special charges payable by the cargo in respect of which the deposits have been collected. The trustees shall have power to make payments on account or refunds of deposits which may be certified to in writing by the average adjuster. Such deposits and payments or refunds shall be without prejudice to the ultimate liabilities of the parties.

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Oct. 31.

Landlord and Tenant — Rent Restriction — Recovery of Possession — Non-payment of Rent "lawfully due from the tenant"—Arrears of Rent owing by original Tenant at Time of Death Intestate—Liability of Member of Family residing with him at Time of Death—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.*

The defendant's father, who was the statutory tenant of a dwelling-house to which the Rent Restriction Acts applied, died intestate and leaving no widow. The defendant was admittedly a member of her father's family, "residing with him at the time of his death" within the meaning of s. 12, sub-s. 1 (*g*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. When he died the defendant's father owed six months' rent to the landlord of the house:—

Held, that the defendant was a statutory tenant of the premises and had to observe all the terms and conditions of the contract of tenancy which her father had originally held, but her statutory tenancy had begun with her, and she was not liable to pay the arrears of rent owing by her father at the time of his death, they being a liability which had been incurred by a preceding tenant.

APPEAL from West London County Court.

By an agreement in writing dated May 17, 1917, and made between Alfred Chilton Pearson, as lessor, of the one part,

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and Edward William Clifton, of the other part, Edward William Clifton became tenant of a dwelling-house known as 158 Conningham Road, Shepherd's Bush, London, on a yearly tenancy at a rent of 40*l.* a year. Subsequently Alfred Chilton Pearson assigned his interest under the agreement to the plaintiff, Emily Clara Tickner.

In 1923 the agreement was terminated. Edward William Clifton became a statutory tenant, continuing in occupation of the dwelling-house under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and the rent of the premises was raised from 40*l.* to 51*l.* a year.

On September 27, 1926, Edward William Clifton died intestate and leaving no widow. At that date he owed to the plaintiff six months' rent, amounting to 25*l.* 10*s.*

The defendant, Miss Clifton, was a daughter of Edward William Clifton, and it was not disputed that she was a member of his family "residing with him at the time of his death" within s. 12, sub-s. 1 (*g*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. (1) After her father's death the defendant remained in occupation of the premises and paid rent to the plaintiff, which the plaintiff accepted without prejudice to her claim that the defendant was liable to pay to her the 25*l.* 10*s.* arrears of rent which were owing by Edward William Clifton at the time of his death.

On the continued refusal of the defendant to pay these arrears the plaintiff instituted proceedings in the county court, in which she claimed (*a*) possession of the dwelling-house on the ground of the non-payment of the 25*l.* 10*s.* arrears of rent; (*b*) the amount of those arrears; and (*c*) mesne profits.

The county court judge gave judgment in favour of the plaintiff, and the defendant appealed.

(1) By Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 1 (*g*): . . . . "the expression 'tenant' includes the widow of a tenant dying intestate who was residing with him at the time of his death, or, where a tenant dying intestate leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the County Court."

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Avetoom for the defendant. The county court judge was wrong in holding that the defendant was liable to pay to the plaintiff the arrears of rent owing by her father at the time of his death. Clearly she could not have been successfully sued for it during the lifetime of her father, but the county court judge seems to have based his decision on the fact that she had become executrix de son tort of her father's estate. There was, however, no evidence of that. Nor could she be said to be an assignee of the term demised under the agreement of May 7, 1917.

[He was stopped.]

H. Lloyd-Williams for the plaintiff. The ground of the decision of the county court judge was that after her father's death the plaintiff continued his tenancy with all its rights and liabilities, and it is submitted that that is correct. Sect. 12, sub-s. 1 (*g*), of the Act of 1920 does not create a new tenancy in favour of the person who was residing with the original tenant at the time of his death. It merely places the new tenant in the shoes of the old tenant. The defendant is a tenant "who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies," within s. 15, sub-s. 1, of the Act of 1920, and she must, therefore, "observe . . . . all the terms and conditions of the original contract of tenancy." One of those "terms and conditions" in the present case was that all rent and arrears of rent should be paid to the landlord by the tenant. In failing to pay the arrears of rent due under the tenancy to which she has succeeded the defendant has failed to "observe . . . . all the terms and conditions of the original contract of tenancy," and an order for her ejectment from the premises can therefore be made under s. 5, sub-s. 1 (*a*), of the Act of 1920 as re-enacted by s. 4 of the Rent and Mortgage Interest Restrictions Act, 1923. Furthermore, the liability of the defendant at common law is not altered by the Rent Acts: see *Hewitt* v. *Rowlands* (1); and at common law she is either executrix de son tort of her father's estate, and, therefore, liable to be sued for his debts: *Williams* v.

(1) [1924] W. N. 196.

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Heales (1); or an assignee of the term reserved under the contract of tenancy.

SWIFT J. In my opinion the position of the defendant in relation to the premises possession of which is claimed in the present proceedings is that of a statutory tenant. It was contended, both before the county court judge and in this Court, that the defendant is liable to pay the arrears of rent owed to the plaintiff by her father, because she is either executrix de son tort of his estate or an equitable assignee of the term which her father held. I am not sure whether or not she is an executrix de son tort. I think it quite possible that she has so dealt with her father's estate as to render herself liable to account for such of the proceeds of it as have come into her hands, but there is no evidence of that. Nor is there any evidence that the defendant is an assignee of the term.

As I have said, the defendant is a statutory tenant. She has all the rights and liabilities of a statutory tenant, but her statutory tenancy began with her. She has, it is true, to observe the terms and conditions of the original agreement of tenancy. If those terms require that the tenant shall put the house into repair she must put it into repair. If they require that the tenant must keep it in repair she must do so, and that may imply that she must first of all put it in repair. If the agreement requires that the tenant shall not carry on a particular business or commit certain nuisances at the premises she must observe it, and if her father carried on a prohibited trade or committed any prohibited nuisance she must cease doing so. But she is not responsible for what went on before she became the statutory tenant of the premises. I can find nothing in the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which provides that a statutory tenant who has become entitled to the benefits of a statutory tenancy because he was a member of the family of the preceding tenant and was residing with him at the time of his death is liable to discharge liabilities incurred by

(1) (1874) L. R. 9 C. P. 177.

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the preceding tenant during his life. The 25*l.* 10*s.* which the defendant's father owed to the plaintiff is not a debt owing by the defendant herself qua statutory tenant, whatever may be her liability with regard to it in some other capacity.

This appeal must, therefore, be allowed, the judgment of the county court judge must be set aside, and judgment must be entered for the defendant.

ACTON J. I agree.

Appeal allowed.

Solicitor for appellant: *H. B. I. Schultess-Young.*
Solicitors for respondent: *Whittington, Son & Barham.*

G. F. L. B.

THE KING *v.* WILLIAM JONES.

C. C. A. 1928 *Nov.* 26.

Criminal Law—Conviction of Felony—Compensation Order—Appeal to Court of Criminal Appeal—Jurisdiction—"Order . . . . with reference to the person convicted"—"Sentence"—Forfeiture Act, 1870 (33 *&* 34 *Vict. c.* 23), *s.* 4—*Criminal Appeal Act,* 1907 (7 *Edw.* 7, *c.* 23), *s.* 21.

There is an appeal to the Court of Criminal Appeal against an order made under s. 4 of the Forfeiture Act, 1870, for the payment of compensation by a person convicted of felony to a person aggrieved by loss of property suffered by him through the felony, because by the said section such compensation constitutes and is enforceable as a judgment debt, and is therefore a "sentence" within the meaning of s. 21 of the Criminal Appeal Act, 1907, which enacts that "The expression 'sentence' includes any order of the court made on conviction with reference to the person convicted."

APPEAL against an order made under s. 4 of the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), for compensation after a conviction for felony.

On July 10, 1928, the appellant, William Jones, was convicted before Judge Atherley Jones at the Central Criminal Court of uttering a cheque for 275*l.* knowing the indorsement to be forged, and was sentenced to eighteen months' imprisonment with hard labour. On July 31 he appealed to the Court of Criminal Appeal for leave to appeal against both conviction and sentence, but leave was refused. Immediately after

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the conviction (as the Court held in the circumstances detailed in the judgment of Lord Hewart C.J.) an order was made against the appellant under s. 4 of the Forfeiture Act, 1870, to pay compensation to the prosecutor as a person aggrieved, for the loss of property suffered by the prosecutor through the said felony. The appellant now appealed against that order on grounds set out in the judgment. During the argument Avory J. suggested that there was no appeal to the Court against this order. The case is reported on this point only.

Gerald Howard for the appellant. There is a right of appeal to the Court, this order being a "sentence" under s. 21 of the Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), which says: "The expression 'sentence' includes any order of the court made on conviction with reference to the person convicted or his wife or children."

[AVORY J. Is not this an order with reference to the property of the person convicted, not an order with reference to the person convicted?]

An order dealing with the property of a person is an order with reference to its owner. By s. 6 of the Act of 1907 there is an appeal against an order for the restitution of stolen property. (1) That order is analogous to the present one.

[AVORY J. If such an order could be described as an order with reference to the person convicted s. 21 of the Act would have been sufficient, and s. 6 would be unnecessary.]

"With reference to" is equivalent to "affecting."

[He then dealt with the grounds of appeal.]

W. B. Frampton for the prosecution did not press the contention that there was no appeal, but dealt with the other points raised.

The judgment of the Court (LORD HEWART C.J., AVORY and ACTON JJ.) was delivered by

LORD HEWART C.J. This appellant was convicted at the Central Criminal Court on July 10, 1928, of uttering a cheque

(1) But see *Rex* v. *Elliott* [1908] 2 K. B. 452.

for 275*l.* knowing the indorsement to be forged, and was sentenced to eighteen months' imprisonment with hard labour. He applied for leave to appeal against conviction and sentence to this Court on July 31, but his application was refused. He now wishes to appeal against an order or award made under s. 4 of the Forfeiture Act, 1870, ordering him to make a payment by way of compensation, and two points are taken on his behalf. It is said, firstly, that the order was not made "immediately after the conviction" within the meaning of the section, and, secondly, that it was made in the absence of the appellant and without any notice to him. But a preliminary question also arises, and that is, whether there is a right of appeal to this Court with reference to an order of this kind. Counsel for the prosecution did not think fit to argue this point. It is important to see what the facts of the case were. After the conviction of the appellant on July 10 at a sessions which had commenced on June 26, 1928, a police officer, Gosnold, giving evidence as to character, said that Jones had given him every assistance in the case, and wanted to make restitution of the money in his hands, and had given him a written authority, but that the bank would not act upon it. We know that a written authority was in fact given. After Jones had been sentenced counsel for the prosecution immediately applied to the judge in these terms, which I am reading from the transcript of the shorthand note: "I ask your Lordship to authorise the cheque for 90*l.*——" The learned judge, who had been made aware of the police evidence set out above, said: "It is not necessary, but I will do so." The appellant was still in the dock when this application was made. The appellant afterwards repented of the authority he had given and sought to countermand the order to the bank. It then appeared that, although the judge had said what I have just read, no order had in fact been drawn up. Accordingly, on September 7, 1928, a further application was made to the learned judge, and he then said to the counsel making the application: "Now you ask me to make the order which I already made and which was never properly recorded as an order because it was deemed,

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and apparently with good sense, to be an unnecessary order," in view, that is, of the prisoner's assent. It is true that when one looks at other passages the account given of the matter is not always the same. But more than once the learned judge does say "I made the order," and we think that he did make the order on July 10, but that it was not presently recorded, for the reason that everybody in Court was then aware of the statement which had been made by the police that the appellant himself had given authority to repay the money. The conclusion is that the order subsequently recorded was in fact made immediately after the conviction. The words of s. 4 are: "It shall be lawful for any such court .... if it shall think fit, upon the application of any person aggrieved, and immediately after the conviction of any person for felony, to award any sum of money, not exceeding 100*l*., by way of satisfaction or compensation for any loss of property suffered by the applicant through or by means of the said felony." In view of what was said and done we think that on the true interpretation of those words the application was made "immediately after the conviction." And in any case the appellant cannot be heard to say that the order was not so made, because the fact that it was not recorded was due solely to his own conduct in making an offer from which he afterwards receded. And that statement of facts is also the answer to the contention that the order was made behind his back.

The question whether an appeal from this order lies to this Court has not been fully argued, because counsel for the prosecution did not feel disposed to press the point. It seems to us that there is more than one ground upon which the appeal may lie, but it is sufficient to mention one ground. Under the latter part of s. 4 of the Act of 1870 it is enacted that the compensation awarded "shall be deemed a judgment debt due to the person entitled to receive the same from the person so convicted, and the order for payment of such amount may be enforced in such and the same manner as in the case of any costs ordered by the court to be paid under the last preceding section of this Act," that is, enforced as is the

payment of costs in a civil action. The order creates therefore a judgment debt deemed to be due from the person convicted. When one turns to s. 21 of the Criminal Appeal Act, 1907, it says: "The expression 'sentence' includes any order of the court made on conviction with reference to the person convicted or his wife or children." In the opinion of the Court the words "with reference to" are sufficiently wide to include an order for the payment of money by a person as satisfaction or compensation on a conviction of felony, such money being deemed to be a judgment debt due from the person so convicted. The order, in our opinion, is made "with reference to" him as well as his property.

In the result, therefore, we are of opinion that there is a right of appeal against this order as an appeal against sentence. But we also think that the appeal fails on both the grounds of appeal set out, and it is dismissed accordingly.

Appeal dismissed.

Solicitor for appellant: *Registrar of the Court of Criminal Appeal.*

Solicitors for the prosecution: *Neve, Beck & Crane.*

W. L. L. B.

1928
Feb. 3, 7.

WICKETT *v.* PORT OF LONDON AUTHORITY.

[1926. W. 3354.]

Negligence—Docks—Entrance Lock—Barge passing through Lock—Lighterman injured through Breakage of Rope supplied by Owners of Dock—Notice exempting Owners of Dock from Liability—Lightermen availing themselves of Facilities and Assistance of Owners' Servants to do so at their own Risk—Lighterman obliged to take Rope on to Barge—Liability of Owners of Docks.

A lighterman while navigating his barge from a dock, belonging to the Port of London Authority, through the entrance lock into the river Thames, was under the order and directions of the Authority's servants. He was directed to take a rope on board and attach it to his barge. This rope broke, and struck the lighterman who was on board the barge, and who was thereby injured. He claimed to recover damages from the Port Authority, alleging that his personal injuries were due to the negligence of their servants. The Port Authority relied in defence upon the terms of a notice which was exhibited on the pierhead of the lock and of which the lighterman admittedly had notice. The notice provided that "Lightermen and others availing themselves of the facilities and assistance of the servants of the Authority in bringing their craft into and through the entrances of the docks, must do so at their own risk and upon the understanding that no liability whatsoever shall attach to the Authority or its servants for any loss, damage or injury from whatever cause arising to or by the craft or to or by any person or goods on board thereof." The jury found that the plaintiff had been injured through the negligence of the defendant's servants, and that the plaintiff had no option to refuse to take the rope on board :—

Held, that the defendants were exempted from liability for the negligence of their servants by the terms of the notice exhibited on the pierhead and of which the plaintiff had notice, and that the fact that the plaintiff was compelled to navigate his barge according to the directions of the defendants' servants was not inconsistent with the fact that the plaintiff was in the circumstances "availing himself of the facilities and assistance of the servants of the Authority," and therefore according to the terms of the notice the defendants were under no liability for the injury sustained by the plaintiff.

Forbes, Abbott & Lennard, Ld. v. *Great Western Ry. Co.* (1927) 138 L. T. 286 followed.

Further consideration of an action tried before Avory J. and a special jury.

The plaintiff, who was a lighterman, claimed to recover damages from the defendants for personal injuries sustained by him through the negligence of the defendants' servants, while he was in charge of a barge belonging to his employers.

The defendants were the owners of the Victoria Docks and also of the lock giving admittance to the dock from the river Thames, and they received dues and charges in respect of vessels using the same.

On August 4, 1926, the plaintiff was navigating his employers' barge from the Victoria Docks through the lock into the river Thames, and while doing so was under the orders and directions of the defendants' servants. In order to help to pass the barge through the lock the plaintiff was directed by the defendants' servants to take a rope supplied by the defendants on to his barge and to attach it to the barge. This rope broke, and struck the plaintiff who was on board the barge, and was thereby injured.

The defendants denied that they or their servants had been guilty of negligence, and they further relied upon the terms of a notice which was exhibited at the pierhead of the lock, and which was as follows :—

"Port of London Authority.

"Notice to Lightermen and Others.

"Lightermen and others availing themselves of the facilities and assistance of the servants of the Authority in bringing their craft into and through the entrances of the docks, must do so at their own risk and upon the understanding that no liability whatsoever shall attach to the Authority or its servants for any loss, damage or injury from whatever cause arising to or by the craft or to or by any person or goods on board thereof. By Order."

The defendants said that the use of the rope and the assistance of their servants were offered to and accepted by the plaintiff on the terms of that notice.

It was admitted that the plaintiff was aware of the terms of the notice which had been brought to his attention.

The jury found that the plaintiff had been injured through the negligence of the defendants' servants, and also that the plaintiff had no option to refuse to take the rope on to the barge.

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R. Mitchell Banks K.C. and *W. Shakespeare* for the plaintiff. The defendants cannot rely upon the notice which they exhibited on the pierhead of the lock as exempting them from liability for the negligence of their servants, having regard to the finding of the jury that the plaintiff had no option to refuse to take the rope on to the barge. The plaintiff was obeying an order which the defendants were authorized to give under s. 160 of the Port of London (Consolidation) Act, 1920 (10 & 11 Geo. 5, c. clxxiii.), and which the defendants chose to give. If a lighterman enters the docks with his barge he is bound to obey the orders which the dockmaster gives. The plaintiff in this case was not "availing" himself "of the facilities and assistance of the servants of the Authority" within the terms of the notice, but was obeying an order of the defendants' servants which was lawfully given, and therefore the maxim "Volenti non fit injuria" does not apply.

[*The Belgic* (1) was also cited.]

C. B. Marriott K.C. and *K. S. Carpmael* for the defendants. The defendants are exempted from liability for the negligence of their servants by the terms of the notice, which was exhibited at the entrance to the dock, and of which it is admitted that the plaintiff had notice. The case is covered by the decision of the Court of Appeal in *Forbes, Abbott & Lennard, Ld.* v. *Great Western Ry. Co.* (2), where it was held that a condition or by-law exempted the defendants from liability for negligence. The Harbours, Docks and Piers Clauses Act, 1847, which was incorporated by the special Act of the defendants in that case, contained sections giving similar power to those contained in s. 160 of the Port of London (Consolidation) Act, 1920.

Cur. adv. vult.

Feb. 7. AVORY J. read the following judgment :—

In this case the jury found that the plaintiff, a lighterman, had been injured by the negligence of the defendants' servants, and, in answer to a question put to them at the request of the

(1) (1875) 2 P. D. 57n. (2) 138 L. T. 286.

learned counsel for the plaintiff, they found that in the circumstances the plaintiff had no option to refuse to take the capstan rope on to the barge, the breaking of which rope was the immediate cause of the injury.

On behalf of the defendants it was submitted that they are exempted from liability by the terms of a notice exhibited at the entrance to the dock, which is set out in para. 4 of the defence, and of which it is admitted that the plaintiff had notice, and they rely on the judgment of the Court of Appeal in *Forbes, Abbott & Lennard, Ld.* v. *Great Western Ry. Co.* (1), as governing this case. In view of that judgment, and indeed without its assistance, I entertain no doubt that the words of the notice in the present case are prima facie adequate to exempt the defendants from liability for the negligence of their servants. But on behalf of the plaintiff Mr. Mitchell Banks contends that, the jury having found that the plaintiff had no option to refuse to take the rope on to his barge, in other words being compelled to obey the direction to that effect of the defendants' servants, he was not in the circumstances "availing himself of the facilities and assistance of the servants" of the defendants within the meaning of the notice, and in support of that contention he refers to s. 160 of the Port of London (Consolidation) Act, 1920.

Such assistance was in this case rendered by the defendants gratuitously, and in my opinion the fact that the plaintiff was compelled to regulate his vessel according to the directions of the dockmaster is in no way inconsistent with the fact that he was in the circumstances "availing himself of the facilities and assistance of the se vants of the Authority"—an expression which I think should be construed in this case as equivalent to "taking advantage of those facilities and assistance," and this the plaintiff was doing for the benefit of his employers, who had brought his barge to the front rank to expedite its progress through the lock to the river, the plaintiff well knowing that in the ordinary course the tow rope would be attached to a barge in that position.

(1) 138 L. T. 286.

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In these circumstances I am unable to give effect to the contention on behalf of the plaintiff, and the defendants are, in my opinion, entitled to judgment.

Judgment for defendants.

Solicitors for plaintiff: *Pattinson & Brewer.*
Solicitor for defendants: *J. D. Ritchie.*

R. F. S.

1928
Nov. 13.

THE KING *v.* EDMONTON INCOME TAX COMMISSIONERS.

Ex parte THOMPSON.

Revenue—Income Tax—Assessment—Appeal to Commissioners—Case stated—Notice in Writing—Condition Precedent—Mandamus—Income Tax Act, 1918 (8 *& 9 Geo.* 5, *c.* 40), *s.* 149.

The Income Tax Act, 1918, s. 149, sub-s. 1, lays down the following rules to be observed in applying for a case stated, after the hearing by Commissioners of an appeal against income tax assessment: (*a*) Immediately after the determination, the appellant or surveyor, if dissatisfied with it as being erroneous in law, may declare his dissatisfaction to the Commissioners; (*b*) having declared his dissatisfaction, he may within twenty-one days, by notice in writing addressed to their clerk, require the Commissioners to state and sign a case:—

Held, that the notice in writing to the clerk to the Commissioners referred to in s. 149, sub-s. 1 (*b*), is a condition precedent, and that, if this condition is not satisfied, the Commissioners have no jurisdiction to state a case.

RULE NISI for mandamus.

An assessment for income tax for the financial year 1926–1927 was made upon the S. M. H. Company, Ld. (in liquidation), the amount claimed being 1366*l*. The company appealed to the General Commissioners for Income Tax, and on May 8, 1928, the Commissioners for Edmonton, in the county of Middlesex, sitting at Enfield, dismissed the appeal and confirmed the assessment.

According to affidavits filed on behalf of the company counsel for the company at the close of the hearing asked the Commissioners to state a case for the opinion of the

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High Court on the ground that the decision was wrong in law. It was also alleged that the Commissioners agreed to state a case, but this was denied in evidence filed on behalf of the Commissioners. No notice in writing requesting a case stated was given by the liquidator to the clerk to the Commissioners, but on June 22 the solicitors for the liquidator wrote to the clerk to the Commissioners asking when the case stated would be ready to be taken up. To this letter the clerk to the Commissioners replied that as no demand in writing for the statement of a case was received by him within twenty-one days after the hearing as provided by the Income Tax Act, 1918, s. 149, sub-s. 1 (*b*), the Commissioners had no power to state a case. (1)

On July 27, 1928, the liquidator applied for and obtained a rule nisi to the Commissioners to show cause why a writ of mandamus should not issue directed to them commanding them to state and sign a case for the opinion of the Court, setting forth the facts and their determination upon the hearing of the appeal. The grounds for the order nisi were (1.) that when the Commissioners at the hearing agreed to state a case it was not essential for such case to be asked for in writing; (2.) that in any event the Commissioners might state a case, even when not asked for, within twenty-one days of the hearing.

Stenham for the Commissioners showed cause. The Income Tax Act, 1918, s. 149, reproduces the Taxes Management Act, 1880, s. 59. The provision in sub-s. 1 (*b*) that the dissatisfied party may give notice in writing to the clerk,

(1) The Income Tax Act, 1918, s. 149, provides: Sub-s. 1:

"(*a*) Immediately after the determination by the General Commissioners, or by the Special Commissioners, of an appeal under this Act, the appellant or the surveyor, if dissatisfied with the determination, as being erroneous in point of law, may declare his dissatisfaction to the Commissioners who heard the appeal.

"(*b*) Having declared his dissatisfaction, he may, within twenty-one days after the determination, by notice in writing addressed to their clerk, require the Commissioners to state and sign a case for the opinion of the High Court thereon.

"(*c*) The party requiring the case shall pay to the clerk to the Commissioners a fee of 20*s*. for and in respect of the same, before he is entitled to have the case stated.

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asking for a case stated, makes writing a condition precedent. Without a written application the justices have no power to state a case. In *Taylor* v. *Taylor* (1) Sir George Jessel M.R. said: "When a statutory power is conferred for the first time on a Court, and the mode of exercising it is pointed out, it means that no alternative is to be adopted."

By the combined effect of the Summary Jurisdiction Act, 1879, s. 33, and the Summary Jurisdiction Rules, 1886, r. 18 (now Rules 1915–1922, r. 52), an application for a case stated under that Act must be made to the Court in writing, writing being a condition precedent: *South Staffordshire Waterworks Co.* v. *Stone*. (2) That Act and Rule amended the Summary Jurisdiction Act, 1857, s. 2, which provided that the dissatisfied party "may" give notice in writing asking for a case stated. The requirement as to writing was found necessary for the purposes of clearness, and in order to avoid the controversy which was apt to arise where there was verbal application only.

The rule here should be discharged. An order for mandamus is discretionary only, and will not issue unless the rules as to procedure laid down by statute, as here under the Income Tax Acts, 1918, s. 149, sub-s. 1 (*b*), have been strictly complied with: *Rex* v. *Stoke-on-Trent Justices*. (3)

[He was stopped.]

William Allen for the liquidator, in support of the rule. Notice of dissatisfaction was given by the liquidator at the hearing, as required by the Income Tax Act, 1918, s. 149, sub-s. 1 (*a*), and that is sufficient to enable the justices to state a case. By sub-s. 1 (*b*) the dissatisfied party "may" give written notice to the clerk. It is not necessary for him to do so; he need only comply with paras. (*c*) and (*d*), which provide that he shall pay the fee for the case stated, and shall then transmit the case to the High Court.

In *Rex* v. *Pembrokeshire Justices* (4) a rule nisi for mandamus was granted, quarter sessions having verbally agreed to state a case, but not having done so.

(1) (1875) 1 Ch. D. 426.
(2) (1887) 19 Q. B. D. 168.
(3) [1926] 2 K. B. 461.
(4) (1831) 2 B. & Ad. 391.

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[AVORY J. That was before the Summary Jurisdiction Acts, and there was then no statute dealing with this procedure.]

LORD HEWART C.J. This is a preliminary question arising on the true construction of the Income Tax Act, 1918, s. 149, sub-s. 1 (*b*). That Act is a Consolidating Act, and the section reproduces the Taxes Management Act, 1880, s. 59. The question is whether the provision there contained as to a notice in writing addressed to the clerk to the Commissioners amounts to a condition precedent or not. Para. (*a*) of s. 149, sub-s. 1, provides that the appellant or surveyor if dissatisfied with the determination of the case "may declare his dissatisfaction to the Commissioners who heard the appeal." Then by sub-s. 1 (*b*), having declared his dissatisfaction, "he may within twenty-one days by notice in writing addressed to their clerk" require the Commissioners to state a case for the opinion of the High Court.

It is urged in support of this rule that while the word "shall" is used in sub-s. 1, paras. (*c*), (*d*) and (*e*), the word "may" is used in para. (*b*). The explanation of the difference lies in the fact that a party who has expressed his dissatisfaction is not compelled to give notice in writing, asking for a case stated. He may not desire a case, and in order to provide for this contingency the words "he shall if he desires to proceed" might have been used in sub-s. 1 (*b*). This contingency is equally well met by the use of the word "may" in sub-s. 1 (*b*). In the Summary Jurisdiction Act, 1857, s. 2, it was similarly provided that upon a summary hearing before justices, either party if dissatisfied with the determination of the case "may" give notice in writing to the justices to state a case. In *Potton Churchwardens* v. *Brown* (1) there was an application to strike out a case stated by the justices on the ground that the application for the case was not in writing, and that writing was a condition precedent. There the justices stated a case in response to an oral application, and the Court were divided in opinion whether

(1) (1864) 28 J. P. 408.

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Lord Hewart C.J.

writing was a condition precedent. Here the justices have refused to state a case in the absence of a written application, and I think they are right in doing so. Under the Summary Jurisdiction Act, 1879, s. 33, and the Summary Jurisdiction Rules, 1915–1922, r. 52, the application for a case stated is required to be in writing. It is plain that such a direction is necessary for the sake of clearness and in order to avoid controversy such as has arisen here as to the recollection of the parties in a case where the request is merely oral.

In *Taylor* v. *Taylor* (1), one of the questions raised turned on the meaning of the Leases and Sales Estates Act, 1855 (19 & 20 Vict. c. 120), s. 16, which provided that any person entitled to the possession, or to the receipt of the rents and profits of any settled estates for a term of years or for life, "may apply to the Court by petition in a summary way to exercise the powers conferred by this Act." Sir George Jessel M.R. said in his judgment: "It appears to me that section 16, though in form merely enabling, is in fact the only enabling part which entitles the Court to set the Act in motion. When a statutory power is conferred for the first time upon a Court and the mode of exercising it is pointed out, it means that no other mode is to be adopted." Those observations are in point here, and it is to be observed that s. 149 of the Income Tax Act, 1918, reproduces s. 59 of the Taxes Management Act, 1880. It is a fallacy to consider s. 149, sub-s. 1, as if it constituted a substantive enactment. It is a link in the whole chain of procedure that the application shall be in writing. For the liquidator it is argued that it is otiose to make a written application if oral consent has already been obtained, and that if the Commissioners orally consented the appellant might dispense with proceedings to compel the statement of a case. But the appellant may take the first step in the proceedings and may not desire to proceed further. If so, he is not committed to proceed or to apply for a case stated. Upon every ground and in accordance with the true interpretation of the sub-section as part of a larger whole, I think that the words as to

(1) 1 Ch. D. 426, 431.

written notice constitute a condition precedent, and that as that condition has not been complied with, the Commissioners here have no jurisdiction to state a case.

AVORY J. The essential word in s. 149, sub-s. 1 (*b*), seems to me to be the word "require." The natural meaning of this clause is that the only way in which an appellant who has expressed his dissatisfaction can require the Commissioners to state a case is by notice in writing. Some light is thrown upon the interpretation of the sub-section by the analogy of the Summary Jurisdiction Act, 1857, s. 2. There the same words are used, and the section provides that the dissatisfied person "may" make application in writing for a case stated. By the Summary Jurisdiction Act, 1879, s. 33, and the Summary Jurisdiction Rules, 1915–1922, r. 32, the word "may" is altered to "shall." It was held in *Stokes* v. *Mitcheson* (1) that these two Acts are to be read together, and if there is any inconsistency the later Act is to prevail. Therefore even if application were made under the earlier Act where the word used is "may," the application would have to be in writing. There is no ground for placing a different construction on the words of s. 149, sub-s. 1, of the Income Tax Act, 1918, and in my opinion the preliminary objection here must succeed.

ACTON J. An intimation by the Commissioners that they raise no objection to an application for a case stated cannot release the dissatisfied party from the obligation thrown upon him by s. 149, sub-s. 1, of the Income Tax Act, 1918. That obligation is to give notice in writing to the clerk of his application, and as this has not been done the preliminary objection succeeds.

Rule discharged.

Solicitors for the Commissioners: *Weld & Beavan.*
Solicitors for the company: *H. E. & W. Bury.*

(1) [1902] 1 K. B. 857.

F. P. F.

1928
July 18.

THOMAS *v.* HUGHES.

Education—School Attendance—Obligation of Parent—Exemption—Employment of Child—Refusal of Education Authority to excuse—Discretion of Court—"Extenuating circumstances"—Probation of Offenders Act, 1907 (7 *Edw.* 7, *c.* 17), *s.* 1, *sub-s.* 1—*Education Act*, 1921 (11 & 12 *Geo.* 5, *c.* 51), *ss.* 46, 138.

A court of summary jurisdiction, on hearing an information against a parent for neglecting the obligation of causing his child to attend school pursuant to a by-law under the Education Act, 1921, is not entitled to treat as "extenuating circumstances" enabling it to exercise its discretionary powers under the Probation of Offenders Act, 1907, the present and prospective permanent employment of the child, where these have been previously rejected by the local education authority as a ground of exemption from that obligation.

Rennie v. *Boardman* (1914) 111 L. T. 713, observations held applicable.

CASE stated by justices for the county of Carnarvon.

On February 20, 1928, an information was preferred by John Owen Thomas, of Llandudno Junction in the county of Carnarvon, school attendance officer (hereinafter called "the appellant"), against William Hughes, of Railway Cottage, Maesdu, Llandudno (hereinafter called "the respondent"), for that he on February 13, 1928, and on divers other dates within six months then past at the parish of Llandudno-cum-Eglwysrhos in that county then being the parent of a child named Robert Hughes of not less than five years, nor more than fifteen years of age, to wit of the age of fifteen years or thereabouts, who was then there residing with him, unlawfully and without reasonable excuse did neglect and omit to cause that child to attend school, as required by the By-laws duly made by the education authority of the Carnarvonshire County Council. (1)

On the said February 20, 1928, the information was heard by the justices, when the following facts were admitted and/or proved:

(1) The By-laws made by the Education Committee of the Carnarvonshire County Council on July 31, 1924, under the Education Act, 1921, Part IV., contained the following provisions:—

1. These By-laws shall apply to children residing in the County of Carnarvon.

2. The parent of every child of not less than five nor more than fifteen years of age shall cause such

The respondent's child, Robert Hughes, was born on February 2, 1913, and was therefore at the date of the hearing of the information fifteen years of age. By-laws made by the Education Committee of the Carnarvonshire County Council which were still in force contained (inter alia) certain specified provisions, which are set out in note (1) below. Between January 24, 1928, and February 13, 1928, respectively, there had been twenty-nine openings of the school and the said Robert Hughes had not attended school once between these dates. On four occasions application had been made under s. 46, sub-s. 3, of the Education Act, 1921, to the appropriate authority on behalf of the said Robert Hughes for exemption from the obligation to attend school as aforesaid, but these applications had been refused on the ground that no financial hardship was thereby involved. Provision had been made at the Llandudno Central School for the education of children over fourteen years of age.

Para. 7 of the case stated that on behalf of the appellant it was contended:

(*a*) That although Robert Hughes attained the age of fifteen years on February 2, 1928, he was bound under the By-laws and under s. 138, sub-s. 1, of the Education Act, 1921, to attend school until the conclusion of the current term in or about the first week in April, 1928.

child to attend school, unless there be a reasonable excuse for non-attendance.

3. Any of the following reasons shall be a reasonable excuse, namely:—

(*a*) That the child is under efficient instruction in some other manner.

(*b*) That the child has been prevented from attending school by sickness or any unavoidable cause.

(*c*) That there is no public elementary school open which the child can attend within three miles measured according to the nearest road from the residence of the child, Provided that, where the local education authority provides suitable means of conveyance for a child between a reasonable distance of its home and a public elementary school, such reason shall not be a reasonable excuse.

. . . . . .

6. Every parent who shall not observe, or shall neglect, or violate these By-laws, or any of them, shall, upon conviction, be liable to a penalty not exceeding, with the costs, twenty shillings for each offence.

(1) See note (1) ante, p. 226.

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(*b*) That the discretion of the Education Authority or Committee of the county council to grant or refuse exemption from the obligation to attend school was absolute and unfettered.

(*c*) That the education authority and not the justices were the judges of whether exemption should be granted on the ground of employment or otherwise.

(*d*) That the justices could not entertain the question whether the fact of employment was a reasonable excuse.

Para. 8 of the case stated that on behalf of the respondent it was stated, but not on oath, that Robert Hughes was employed by Messrs. W. H. Smith & Son, stationers, Llandudno, at wages amounting to 15*s*. a week, and that they were prepared to employ him permanently if the applications for exemption made on his behalf as aforesaid were successful. It was also admitted that two previous informations against the respondent for similar offences had been dismissed upon payment of costs.

The justices, having heard the evidence, were of opinion that the case against the respondent had been proved; but having regard to the extenuating circumstances in which the offence was committed, and in exercise of the discretion vested in them under and by reason of the Probation of Offenders Act, 1907 (1), deemed it inexpedient to inflict any punishment and dismissed the information, and made no order as to costs.

The question for the Court was whether the justices upon the above statement came to a correct determination and

(1) The Probation of Offenders Act, 1907, provides:

Sect. 1: "(1.) Where any person is charged before a court of summary jurisdiction with an offence punishable by such court, and the court thinks that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the court may, without proceeding to conviction, make an order either—

(i) dismissing the information or charge; or

(ii) discharging the offender conditionally on his entering into a recognizance. . . . ."

decision in law and in the exercise of their discretion, and if not what should be done in the premises.

Pritt K.C. (*Ralph Sutton* with him) for the appellant The justices, being of opinion that it had been proved that the respondent had committed the offence of contravening by-law 2 of the By-laws in question made pursuant to the Education Act, 1921, ss. 46 and 138, by failing to cause his child to attend school, ought under by-law 6 to have convicted the respondent and imposed a penalty upon him, unless on some sufficient ground they could decline to do so. The only adequate grounds on which they could decline to do so were, either that under by-law 2, there was a reasonable excuse for the non-attendance of the child at school, or that the case was one in which they could exercise their discretionary powers under the Probation of Offenders Act, 1907, s. 1, sub-s. 1. There is no allegation on behalf of the respondent that there was, under by-law 2, a reasonable excuse for the non-attendance of the child at school; but even if that allegation had been made, it could not have been sustained in the present case: *Rednall* v. *Beamish.* (1) The justices were of opinion that they should exercise their discretionary powers under the Act of 1907, s. 1, sub-s. 1, on the ground that there were "extenuating circumstances" in which the offence was committed within the meaning of that enactment. There were not, however, here any extenuating circumstances. The facts that a firm was employing the boy and was prepared to employ him permanently could not be regarded as extenuating circumstances within the enactment, because the education authority had already refused several applications under the Education Act, 1921, s. 46, for exemption of the respondent from the obligation to cause the child to attend school on the ground of that employment: see *Rennie* v. *Boardman.* (2) Neither can the facts that two previous informations against the respondent for similar offences were previously dismissed be regarded as extenuating circumstances, because the justices who heard these previous

(1) (1926) 135 L. T. 155. (2) 111 L. T. 713.

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informations had no better right to dismiss them than the justices who heard this information had to dismiss it. The justices were not entitled to exercise their discretionary power under the Act of 1907 on the ground that the offence was of a trivial nature, inasmuch as the local education authority had refused to exempt the respondent from his obligation to cause the child to attend school: see *Phillips* v. *Evans*. (1)

This case should be remitted to the justices with a direction to convict the respondent.

The respondent did not appear by counsel or otherwise.

LORD HEWART C.J. This is a case stated by justices for the county of Carnarvon.

The appellant, who is a school attendance officer, preferred an information against the respondent charging that the respondent unlawfully and without reasonable excuse neglected and omitted to cause his child to attend school, as required by the By-laws made by the education authority of the Carnarvonshire County Council.

The facts are clear and are not in dispute. The case states that on four occasions application was made under the Education Act, 1921, s. 46, sub-s. 3, to the appropriate authority for exemption from the obligation to cause the child to attend school, but that each of these applications was refused on the ground that no financial hardship was involved in making the attendance compulsory. It was stated on behalf of the respondent before the justices that the boy was employed at wages amounting to 15*s*. a week, and that his employers were prepared to employ him permanently if an application on his behalf for exemption were successful. It was also stated that two previous informations against the respondent for similar offences had been dismissed. The justices were of opinion that the case against the respondent had been proved, but, having regard to "extenuating circumstances" and in exercise of the discretion vested in them by the Probation of Offenders Act, 1907, they dismissed the information.

(1) [1896] 1 K. B. 305.

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In these circumstances the question is whether there were any materials which entitled the justices to take the course which they thought it proper to take. It has been held more than once and it is perfectly clear that, where under the Education Acts there has been a refusal by the education authority to grant exemption from the obligation to cause a child to attend school, that refusal is not to be defeated by the adoption of any circuitous method. If such a course as that were permitted, the Acts would be reduced to so much waste paper. Where there has been a refusal by the education authority to exempt a child from attendance on the ground of his employment, it cannot be a reasonable excuse for his non-attendance that he has employment in fact. In the present case, however, what the justices have found is, not that there was any reasonable excuse for the boy's non-attendance, but that there were extenuating circumstances, and they were of opinion that, though the offence had been proved, they ought not, having regard to these extenuating circumstances, and in the exercise of their discretion under the Probation of Offenders Act, 1907, to record a conviction against the respondent. What are the extenuating circumstances referred to by the justices? There is nothing in the case that gives a hint, except it be in para. 8, where it is stated that the boy was employed at wages of fifteen shillings a week, and that his employers were prepared to employ him permanently if they could properly do so. If the justices could treat the circumstances there stated as extenuating circumstances entitling them to exercise their probationary powers, it would follow that in any case in which the facts involved in the child's employment had been deliberately put aside as a ground of exemption from the duty to cause the child to attend school, and could not be relied upon as a reasonable excuse for his non-attendance, the law might nevertheless be frustrated by the admission of these facts as extenuating circumstances. The justices would so be entitled to say that the fact that the person charged had already committed a breach of the law was a ground for their refusal to convict him of the offence with which he was charged. That would certainly be a grotesque result.

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One may sympathise with the desire of the parent that his child should be allowed to accept the tempting offer of immediate employment at a wage of fifteen shillings a week with a prospect of permanent employment, but that cannot be a reason for excusing him from the performance of his statutory duty. In *Rennie* v. *Boardman* (1) Avory J., after stating that the contentions on behalf of the defendant in that case were bad, made these observations, which seem to be very much in point: "there then remains but one question for us to consider—namely, whether the justices were warranted under s. 1, sub-s. 1, of the Probation of Offenders Act, 1907, in dismissing the information. On more than one occasion it has been pointed out by this Court that the provision in the statute of 1907 does not allow the justices to go to the length of saying that a particular offence created by the statute is, in their opinion, a trifling one, and that therefore they will not put the law into force. It only entitles them to say that when an offence has been committed the circumstances surrounding the whole affair make it an offence of a merely trifling nature. In the present instance the offence consists in a kind of disobedience which, unless it is checked, will go on increasing from day to day and will, no doubt, increase in frequency, and it is not right, therefore, for the justices to say that it is an offence of so trifling a nature that they ought not to convict the person charged with it." Here the justices in purporting to exercise their powers under the Act of 1907 have thought fit to employ the phrase, not that they had regard to "the trivial nature of the offence," but, that they had regard to "the extenuating circumstances under which the offence was committed." On analysis the extenuating circumstances relied upon by the justices seem to amount to no more than the facts which clearly prove that the offence was committed. The boy was not at school because he was at work; but he ought to have been at school instead of being at work. The justices had here no materials which could be regarded as extenuating circumstances for the

(1) 111 L. T. 713, 715.

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purposes of the Act of 1907, and they were not entitled to dismiss the information under that Act. The amount of the penalty to be imposed upon the respondent is of course entirely for the justices to determine.

In my opinion this appeal should be allowed, and the case should go back to the justices to convict the respondent.

ACTON J. I agree.

BRANSON J. I agree.

Appeal allowed. Case remitted.

Solicitors for the appellant: *T. D. Jones & Co., for David G. Jones, Carnarvon.*

J. R.

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Oct. 29, 30.

Revenue — Betting Duty — Gaming and Wagering — "Bookmaker" — Bet —Totalisator—Horse Races—Finance Act, 1926 (16 & 17 *Geo.* 5, *c.* 22), *ss.* 15, 18.

By the Finance Act, 1926, s. 15, sub-s. 1, "betting duty" is imposed on every bet made with a bookmaker at a rate of 3½ per cent. of the amount paid or offered, or promised to be paid to, the bookmaker; and by sub-s. 3 betting duty is payable "by the bookmaker with whom the bet is made."

By s. 18, sub-s. 1: "In this Part of this Act, unless the context otherwise requires—The expression 'bet' means a bet on an event of any kind; The expression 'bookmaker' means any person who, whether on his own account or as servant or agent to any other persons carries on, whether occasionally or regularly, the business of receiving or negotiating bets, or who in any manner holds himself out or permits himself to be held out in any manner as a person who receives or negotiates bets."

A limited company was the proprietor and financial controller of a club, which was formed for social intercourse. Election to the club was in the usual way, subject to confirmation by the company. The club premises included a hall, at one end of which was a totalisator, a mechanical apparatus for the purpose of recording the stakes of backers. There was also a pari-mutuel, which was a similar apparatus, but was operated by hand. Members backing horses were required to subscribe to the club rules, one of which was that the club acted simply as a distributing agent. The rules also empowered the club to deduct

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10 per cent. of the stakes for expenses, the balance to be divided amongst those members who had backed the winning horses. Any fractions remaining after the winnings had been apportioned were retained by the club to provide against possible defaults by members in their payments.

On an information preferred by the Attorney-General against the company, which was treated as identical with the club, alleging that the company was liable to pay betting duty in respect of wagers on horse races made by members of the club, by means of the totalisator and the pari-mutuel :—

Held, by a majority of the Court of Appeal (Greer and Russell L.JJ.; Lord Hanworth M.R. dissenting), that, assuming that the company was a "bookmaker" within s. 18 of the Act, under the rules of the club bets were not made with the company or the club, but by the members inter se; that there was no primary liability on the company; and that, even accepting the view that there was a liability on the company to guarantee the solvency of the losing members or the payment of their losses, that did not render the company liable under s. 15 of the Act.

Per Russell L.J.: In order to attract the tax imposed by s. 15 of the Act the "bookmaker" with whom the bet is made, must be the same person as the bookmaker to whom or to whose order or use money is paid or offered, or premised to be paid: and there must be a bet made with a bookmaker.

Decision of Rowlatt J. reversed.

APPEAL from a decision of Rowlatt J. on an information preferred by the Attorney-General.

The defendant company (hereinafter called "the company") was a private company registered under the Companies (Consolidation) Act, 1908, as a company limited by shares with a nominal capital of 25,000*l.*, divided into 20,000 cumulative preference shares of 1*l.* each and 100,000 ordinary shares of one shilling each, and its registered office was situate at 85 High Holborn, London, W.C.

The company was, at all material times, the proprietor of the Stadium Club, situate at 85 High Holborn aforesaid (hereinafter called "the club").

The rules of the club, which were in force at all material times, were, so far as material, as follows :—

"2. The Club is formed for the promotion of social intercourse among persons interested (directly or indirectly) with literature, art, music, the drama, the scientific and literary professions, sport, racing, athletics and commerce, and to provide a club house and other accommodation and

conveniences, and generally to afford members all the usual privileges and advantages of a club.

" 3. The Club is a proprietary club, of which the Luncheon and Sports Club, Ld. (in these rules called ' the Company '), are the proprietors. All entrance fees, subscriptions, and other payments by members become the property of the Company, and the Company shall be solely responsible for the provision of the club-house and all things and service necessary for carrying on the Club (except intoxicating liquors and the service and storage thereof), and shall have entire control of all matters of finance in connection with the Club . . . . The only liability of members is for such payments to the Company as are provided for by these rules.

" 4. Apart from honorary, temporary and supernumerary members (see rules 17, 18 and 20) regular members shall be entitled to participate in all privileges and advantages which shall for the time being be afforded by the Club in pursuance of its objects, as stated in rule 2. . . . . Every director of the Company for the time being shall by virtue of and so long as he retains such directorship be a regular member of the Club without entrance fee or subscription.

" 5. Save as stated in rule 4, every candidate for either class of membership must be proposed by a regular member and seconded by another regular member of the Club. . . . . No such election shall be effective unless and until the candidate is approved by the Company, who shall be entitled to withhold such approval without giving any reason.

" 9. Subject to the Company's right to withhold approval of candidates as stated in rule 5, the election for membership shall be by ballot of the general committee, and shall take place at such times as the general committee shall think fit. One black ball shall exclude. . . . .

" 10. All members shall be subject to re-election by ballot of the general committee annually, for which purpose the general committee shall hold a meeting between the 1st and 21st of December in every year, and any member who shall not be re-elected shall cease to be a member at the end of the year. . . . .

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"17. The general committee shall have power to elect as honorary members officials of amateur organisations, amateur champions, and others who are interested in the general objects of the Club, as the committee may see fit. Honorary members shall not be required to pay any entrance fee or subscription.

"18. The general committee shall have power to elect temporary members for any period not exceeding three months. Every candidate for temporary membership shall be proposed by one regular member, and seconded by another regular member, in writing addressed to the secretary. . . . . The general committee may also elect as temporary members, without fee or subscription, the members of any other registered club of not less than two years' standing, during such period (not exceeding two months in any one year) as the premises of such other club shall be under repair or otherwise not fully available for use.

"32. The general committee shall consist of all the directors for the time being of the Company ex officio together with such a number of other regular members of the Club as shall from time to time be determined, such other regular members to be elected by the directors at the first meeting of the general committee in each calendar year and to hold office during that year, but so that the majority of the directors of the Company for the time being may at any time after such election determine the tenure of the office of any elected member of the general committee without giving any reason for such determination, and may, but shall not be bound to elect some other regular member in his place.

"36. The general committee shall make all such regulations or bye-laws not inconsistent with these rules as they shall from time to time think necessary or desirable either for the internal management and well-being of the Club or generally in relation to any matters connected with the user of the club-house or affecting the rights or interests of the members of any class as members of the Club, and every such bye-law (unless expressly limited in operation) shall be binding upon all the members of the Club.

"39. The secretary of the Club shall be appointed and paid by the Company. He shall act as secretary, and shall perform such other duties in relation to the Club as the general committee may with the consent of the Company require of him.

"45. The general committee shall be the sole authority for interpreting the rules and bye-laws of the Club and the conduct of members in relation thereto, except that if any question shall arise as to the rights, powers or duties of the Company in relation to the Club or any member of the Club as such the Company shall be the sole authority for determining the same."

For the convenience of members of the club desiring to bet on the result of horse races, the company had at all material times provided at the club-house two instruments, one a large machine called a totalisator, worked entirely by mechanical means, which was used on the days when big races were run, and the other called a totalisator or pari-mutuel, which was a smaller instrument worked by hand, and was used on ordinary racing days. The said instruments were the property of the company, and were controlled and managed exclusively by the servants of the company.

Members wishing to back horses by means of the said instruments were required to join the club pool. Temporary or honorary members, as well as regular members of the club, were permitted to join the club pool, and to back horses by means of the said instruments. All persons engaged in the control and management of the club pool were servants of the company.

The pool members' by-laws, which were in force at all material times, and applied to all transactions by means of either of the said instruments, were, so far as material, as follows :—

"THE STADIUM CLUB ELECTRIC POOL MACHINE REMEMBER.

"The only one in Europe : is the last word in the development of Pool or co-operative system, and it has been left to

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the initiative and enterprise of the Stadium Club to provide one for its Pool members.

"1. Winning members will receive any money due to them on settling day—Saturday.

"2. The Club acts simply as a distributing agent.

"3. It can be used for either 'Win' or 'Place' Pool as desired, even when there are only four runners.

"4. The machine records the amount invested on each horse.

"5. The whole process, from receipt of the voucher until the declaration of the dividend, being automatic, the possibility of fraud and collusion is totally eliminated.

"MEMBERSHIP.

"1. A member of the Stadium Club who wishes to join the Club pool can, on request, obtain an application form, to be filled in and handed to the pool cashier. If he be accepted as a pool member he shall, on payment of the subscription of 10*s.* 6*d.*, be entitled to operate.

"3. Persons elected as pool members of the Club shall be entitled to operate on the club pool by credit vouchers of the following values :—10*s.*, 1*l.*, 2*l.* and 5*l.*, by telegram, letter or telephone (subject to the bye-laws).

"ACCOUNTS.

"1. Pool Members' Accounts.—Accounts are made up to and including Friday, members who on Friday night owe 2*l.* or over to the winning pool members must pay before making any further use of the Club pool. No further credit will be allowed and vouchers will be refused.

"2. Pool Members' Credit.—Every pool member's credit is strictly limited to the agreed amount. Special application must be made for credit over 10*l.* When this amount is lost to winning pool members, it must be paid before any further use is made of the pool. Members are expected to know how much they have lost. If amounts remain unpaid for 7 days, a reminder by letter will be sent to a member owing 2*l.* and over.

"3. Any member indebted to the Club or pool for 14 days or over after being notified at his last known place of address

by A. R. Registered letter shall be posted on the Club notice board, and all privileges of the Club withdrawn. . . . .

"4. Pool members winning 2*l.* and upwards will be paid by cheque—town members at the Club, country members by post—unless instructed otherwise in writing. Accounts under 2*l.* will be carried forward.

"POOL RULES.

"1. The runners and jockeys, market changes, result, pool dividend, and S. P. will be shown on the Publicity Board.

"2. Pool members may use their noms-de-plume when telegraphing or telephoning. Letters containing vouchers must be specially addressed 'Urgent—Pool Manager,' and those containing cheques, money orders or notes to 'the Secretary.'

"10. The unit or minimum of each individual investment shall be the sum of 10*s.*, and amounts in excess shall be multiples of 10*s.* Thus 1 is 10*s.*, 2 is 20*s.*, 3 is 30*s.*, 4 is 40*s.*, etc.

"11. Investments in the Win Pool are on to Win Only, Investments in the Place Pool are 1, 2, 3 if 7 or more runners, and 1, 2 if 4 to 6 runners. Should there be less than 4 runners investments are automatically on to Win Only.

"12. Should the first horse in the Win Pool be unbacked, the whole of that pool will be divided amongst investors on the second horse.

"13. Should both first and second horse be unbacked in Win Pool, the whole of the pool will be divided amongst investors on the third horse.

"14. If a horse is omitted from the list of runners or the Publicity Board and if that horse should win, the pool will be allocated to the second horse, and if that horse is unbacked to the third horse.

"15. If a horse or horses omitted from the list of runners or the Publicity Board should be placed, then the pool will be divided amongst the remaining placed horses. All vouchers received in respect of omitted horses are void.

"20. Objections.—Inasmuch as the pools are calculated after each race and payments made in accordance with such calculations, no objection to the winner or placed horses can

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be recognised unless it is decided the same day. Any objection laid subsequent to the day of the race will be ignored.

"23. Each member agrees with the other to pay to the Club an amount equal to 10 per cent. of his stake in respect of the facilities provided, the superintendence and general running expenses of the pool, which amount shall be deducted from the gross amount of the stakes upon each race, and subject thereto the whole amount subscribed to each pool is divided among the members as follows:—

"24. The total Win Pool, after deduction of the expenses as aforesaid and stake money, will be divided by the number of investments on the winner.

"25. The total Place Pool after the deduction of the expenses as aforesaid and the whole of the stake money on the placed horses, will be equally divided into two or three portions according to the number of the runners (see Pool Rules 11), and the portion shall be divided equally amongst the investors on the placed horses."

The company was responsible for the payment to winning members of the pool of all winnings, calculated in the manner provided by the said by-laws, and losing members were responsible to the company for the payment of their losses. The club cashier was a servant of the company, and the amount of a pool member's credit had to be agreed by a responsible official of the company, usually the secretary.

The Attorney-General alleged that in the circumstances hereinbefore mentioned, the company was a bookmaker, and all the so-called investments of members of the club in the club pool were bets made with the company within the meaning of s. 15 of the Finance Act, 1926, in respect of which betting duty was payable by the company, and that by virtue of the provisions of that section the company was indebted to His Majesty in a sum equal to $3\frac{1}{2}$ per centum of the total amount of the said so-called investments made on and after November 1, 1926.

The Attorney-General on behalf of His Majesty prayed (inter alia) as follows: (1.) That it might be declared that the

company was a bookmaker, and that all so-called investments of members of the club in the club pool were bets made with the company in respect of which betting duty was payable by the company; (2.) that it might be declared that the company was indebted to His Majesty in a sum equal to $3\frac{1}{2}$ per centum of the total amount of the said so-called investments made on and after November 1, 1926; (3.) that an account might be directed to ascertain the sum due to His Majesty as aforesaid; and (4.) that the company might be decreed to pay to the Commissioners of Customs and Excise on behalf of His Majesty the sum which might be found due on taking the account aforesaid.

In an affidavit filed on behalf of the informant, which was not contradicted, it was stated (para. 5): "All moneys paid to and received from members in respect of their weekly betting accounts are recorded in a book called 'Cash Book No. 2 Account' and a separate bank account in the name of 'Luncheon and Sports Club, Limited (No. 2) Account' is kept in respect of the money dealt with in such book. Cheques in payment of winnings are signed by the secretary of the Company and one director thereof."

Throughout the arguments no distinction was drawn between the company and the club, which for the purposes of the case were treated as one and the same entity.

Rowlatt J. held that the club was the principal in each transaction, and was only a distributing agent in the sense that the various transactions balanced. The winners looked to the club for payment, and not to the losers direct. The transactions were bets, and the Crown was therefore entitled to the relief claimed.

The company appealed. The appeal was heard on October 29 and 30, 1928.

Rowland Oliver K.C., *G. D. Roberts* and *D. A. S. Cairns* for the company. The company was not a party to the bets. The bets were made between the members of the club, and the only part the company played was to collect 10 per cent. of the total amount in the totalisator for expenses. Under

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the Finance Act, 1926, s. 15, betting duty is payable only on bets made with bookmakers, and sub-s. 3 provides that the duty shall be paid by the bookmaker with whom the bet is made. The bet must be made with the bookmaker and accepted by him. "Bookmaker" is defined in s. 18, and it may be that the definition is wide enough to include the company, even though the company only negotiates bets as between the members themselves. But it cannot be said that bets were made with and accepted by the company. The proprietors of the totalisator never accepted a bet. They negotiated bets so as to enable members to bet with one another. Gaming and wagering contracts are defined in *Thacker* v. *Hardy* (1) in a way that was adopted in *Forget* v. *Ostigney*. (2) The essence of such contracts is that one person must win and another lose: see also *Carlill* v. *Carbolic Smoke Ball Co.* (3) Here the only persons to lose or win are the members themselves. The totalisator transaction is much more like a sweepstake transaction, such as was considered in *Reg.* v. *Hobbs*. (4) All these authorities show that a person giving facilities for others to enter into wagering or gaming transactions is not himself a party to the transactions. If s. 15 stood alone it could not be said that the company was liable to duty; and although it may be that the definition of "bookmaker" includes the company, the only result is that the company as a person who was bookmaking in sense of negotiating bets would be liable to have its books inspected under s. 16. To render the company liable to duty it must be shown that the bets were "made" with the company within s. 15 and accepted by it. That was clearly not so here.

Sir Thomas Inskip A.-G. and *Bowstead* for the Attorney-General. It is not now denied that the transactions on the totalisator were bets, but it is said that they were made between the persons using it for betting. It has to be remembered, however, that it is the company which is liable for these bets, and it only looks to be recouped by the losers.

(1) (1878) 4 Q. B. D. 685, 695.
(2) [1895] A. C. 318, 326.
(3) [1892] 2 Q. B. 484, 490.
(4) [1898] 2 Q. B. 647.

The company takes the risk of bad debts and sets aside part of the 10 per cent. received by it from the total stakes to meet these bad debts. How can it be said in these circumstances that the bets are not made with the company?

In the Court below the company and the club were treated as the same entity. It is not necessary, therefore, to consider whether the bets were made with the company or the club.

It is submitted that under the rules there was a contract that the company would pay the bet to the winning member. The rules contain no indication that a winning member shall have a right of recourse against a losing member. The only conclusion to be drawn from the rules is that the club undertakes that the winning member shall be paid quite irrespective of the solvency of the losing member. The contract is not merely one of indemnity, but is one of direct liability between the club and the members that the club will pay to the members who have backed the winning horse the whole of the money invested in the pool. Regard cannot be had to the statement in the rules that the club acts simply as a distributing agent if that statement is inconsistent with the other rules. In the nature of the case the bets must be made with the club because the members of the pool do not know with whom they are betting. The only person liable to the winning member is the club.

[GREER L.J. The position of the club is wholly unaffected by the result of the race.]

The distinction between a bet and a sweepstake is pointed out by Lord Russell C.J. in *Reg.* v. *Hobbs.* (1) There is nothing like a sweepstake in the transactions in the present case. In the case of a sweepstake the contingency in respect of which the money is to be paid is not the horse race, but the drawing, and that drawing would be equally good if it took place after the race had been run. Here, assuming that the transaction is a bet, the result depends on the result of the race, and the bet is to be satisfied as between the club and the winning member.

(1) [1898] 2 Q. B. 647, 656, 657.

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Further, the Act is fully satisfied if the bet is with a person who is an agent, although the person making the bet with him does not know the person with whom the bet is to be placed.

On both these grounds, it is submitted, the transactions in this case are transactions which are aimed at by the provisions of the Finance Act, 1926.

Roberts in reply. The effect of the rules is that members gamble among themselves, and it is as a mere matter of machinery that the winnings are paid out by the club.

LORD HANWORTH M.R. This appeal raises a short point under the Finance Act, 1926, which imposes a betting duty. Sect. 15 of the Act runs thus: "There shall, on and after the 1st day of November, 1926, be charged, levied and paid the following duties of excise, that is to say:—(*a*) On every bet made with a bookmaker a duty (in this Part of this Act referred to as 'betting duty.')" I need not proceed to deal with questions of rates or other details, nor indeed is it necessary, in the view which I take of the case, to go to the interpretation clause, which gives a very wide definition of the expression "bookmaker." That definition is to be found in s. 18, and it certainly includes persons who carry on the business of receiving or negotiating bets.

The main question which we have to determine in this case is: Was there a bet made with a bookmaker? It being conceded that if there was a bet directly made with the company which carries on this club, the definition of "bookmaker" is sufficient to include the company. We have to take the facts and to look at their substance. As I understand them they are these: There is a company called the Luncheon and Sports Club, Ld., which is a company incorporated for the purpose of carrying on, and which carries on, the Stadium Club. The registered office of the Company is at the same place. It is a company which provides for the maintenance of a club of members; but I take from the rules of the club some excerpts. Thus, in rule 3: "The Club is a proprietary club, of which the Luncheon and Sports

Club, Limited (in these rules called 'the Company') are the proprietors. All entrance fees, subscriptions, and other payments by members become the property of the company, and the Company shall be solely responsible for the provision of the club-house and all things and service necessary for carrying on the Club," and so on. With regard to membership, under rule 5 members are elected primarily by a committee, to whom certain duties are delegated, but "no such election shall be effective unless and until the candidate is approved by the Company, who shall be entitled to withhold such approval without giving any reason." By rule 14: "All entrance fees and subscriptions shall be paid to the secretary on behalf of the Company or to the account of the Company at the Company's bankers for the time being." Then under rule 32 the general committee is to consist of the directors of the company together with certain other members, but the majority of the directors may "determine the tenure of the office of any elected member of the general committee without giving any reason for such determination." The general committee have certain powers, but they can only make rules which are acceptable to the company, and it is provided by rule 46 that the rules can only be added to, altered, repealed or amended if the company shall have previously given its assent thereto.

Apparently in the Court below no question was raised whether this information was rightly directed to the company. In this Court some distinction has been suggested between the members of the club and the company. It appears to me that under the rules to which I have adverted the club is really carried on by the company, which is the proprietor. Although inter se there are certain privileges accorded to the members with the approval of the directors of the company, yet in truth and in fact the entity which carries on the club is the company.

We have to consider the true bearing of these rules. It is not a case such as was illustrated by *Inland Revenue Commissioners* v. *Eccentric Club* (1), where this Court held

(1) [1924] 1 K. B. 390.

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that there was no business carried on by the club in that case. In the circumstances and under the rules of this club it appears to me that the club is owned by and is carried on by the company. For those reasons I think it is unnecessary to consider whether the defendant is rightly named defendant or whether the individual members ought to have been sued.

The question which we have to determine is whether or not there have been in these cases, when bets are made, as we are told they are made, in the club, bets made with a bookmaker; and the primary point which is taken is that what is done here is not a bet with any bookmaker, the bookmaker in this case being, it is suggested, the company; but is a process of gambling carried on inter se between the members of the club, and that there is no person who can be identified as a principal to the bet; that the member makes some investment, to use a neutral term, but he does not make it with any person in particular; he merely joins with the other members of the club in carrying on something which is more akin to a sweepstake.

I have come to the conclusion that Rowlatt J. is right in this case. Rowlatt J. dealt with the question from both points of view, and in his judgment he considered the question of whether what happened in this system of gambling approximated to a sweepstake, or whether it was a series of bets made between the bettor and the company. "The contention for the defendants," he said, "is that this case is of the former description"—that is, of the sweepstake nature —"the club being, as it is declared to be, a mere distributing agent. It seems to me, however, that the Club is a principal in each transaction, and is only a mere distributing agent in the sense that the various transactions balance. There is no getting away from the fact that the winners look to the Club and the Club looks to the losers. The winners do not look to the losers direct." It appears to me that these observations which I have read are well founded, and for those reasons I need not go through the descriptions which we have been given as to the method which is adopted. The club members are able, by a system of vouchers, to bet upon a

particular race, and ultimately if they are successful they receive a sum which is paid out to them—or I will put it in this way, as it is succinctly put by the Attorney-General: The company agrees to pay the persons who have invested on the winning horse the whole amount invested on the losing horses. If there was no personality on the other side, no person from whom that payment was derived, I agree that the statute would not be satisfied, but I think, as Rowlatt J. has said, that the winners do not look to the losers direct; they look to the club. In all these cases we have to regard the substance of the matter. It matters very little that in these memoranda it is stated that "the Club acts simply as a distributing agent," or that there are other rules which point to the club as being a combination of members. Upon the facts the persons who are entitled as members of the club to make investments upon horse races do it, as we are told by the evidence (which is not contradicted), in this way: "All moneys paid to and received from members in respect of their weekly betting accounts are recorded in a book called 'Cash Book No. 2 Account' and a separate bank account in the name of 'Luncheon and Sports Club, Limited (No. 2) Account' is kept in respect of the money dealt with in such book. Cheques in payment of winnings are signed by the secretary of the Company and one director thereof." In fact therefore the successful bettors have received their winnings from the company. The company itself, as the accounts show, derives a profit from the business which it carries on; but more than that, the accounts are made up on Friday, and it pays out on Saturday on the ex facie accounts as made out on Friday; it does not hold over the ultimate result until it has ascertained whether all the persons who were engaged in the same operation of betting have paid up or will pay up the moneys to be received from them, but the company itself, week by week, directly pays out by its own cheque a sum which is ascertained on the basis that the moneys which nominally are subscribed or invested will be paid up, and that the account is thus made up of what I have called the ex facie

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accounts. I see no power on the part of the company, once it has distributed the moneys on that system, to recover back from the winning members any deficiency which is caused by the default of any member in paying up the quota due from him upon his vouchers.

So far, and if those be the facts, it appears to be quite plain that the bet was made with the company, the bet was honoured by the company, the accounts were made up by the company, and the winnings were paid up by the company whether or not it had in fact received them or whether or not it would in the future receive them. But it is said that in spite of those facts the company is no more than a distributing agent. It is quite true that in the second memorandum that is the description of the club, and it is true that, as I have said, there are one or two other factors which point in the same direction, but it is clear when one looks at the whole, that the only remedy which the company has to get back money which is due to it after it has paid it away is not by actual recourse to a member, but by the power which they exercise upon him by posting him upon the club notice board. There are no rules which indicate that the club will have recourse to the member, collect a deficiency, or alter the sum paid away as winnings. There are merely a certain number of rules which impose disability upon a member if he should not pay.

To my mind it makes very little difference whether the result and the amount to be paid is calculated by the pari-mutuel system or in any other way; what we have to consider here is with whom the bet is made. The method of calculating the odds is unimportant; the main question is: Is the company, or is it not, a principal? In view of the facts which are before us, stated in the affidavit and not contradicted, and in view of the accounts which are before us as to the way in which the company works, and in view of the system upon which the winnings are estimated and paid over to the winners, it appears to me that the company stands as the direct bettor with the other person who engaged in the gamble; and I think Rowlatt J. was quite right in

saying, "There is no getting away from the fact that the winners look to the club and the club looks to the losers. The winners do not look to the losers direct."

In those circumstances it appears to me that those who make the bets under this system, whatever that system may be, do make them with the company, and therefore there is a bet with a bookmaker falling within the words of s. 15, sub-s. 1 (*a*), of the Act of 1926.

GREER L.J. I am unable to come to the same conclusion as the Master of the Rolls. Rowlatt J. has decided, in the words of the formal judgment: "That the defendant Company," the Luncheon and Sports Club, Ld., "is a bookmaker, and that all so-called investments of members of the club in the club pool in the said information mentioned are bets made with the company in respect of which betting duty is payable by the defendant company."

Two questions have been argued. First it is said by the company that there was no evidence in the case that any bet was made between the members and the company, and that therefore, assuming the company to be a bookmaker, still no duty is payable under s. 15 of the Finance Act, 1926, because the duty provided for by that section is only upon "every bet made with a bookmaker," and that if, with the assistance of a bookmaker, a person makes a bet with somebody else, that is not a bet made with a bookmaker, even though the definition of bookmaker is wide enough to include the agents through whom the bet was made. In order to be brought within the Act the bet must be made with the bookmaker, that is to say, it must be a contract between the backer and the bookmaker. Unless it is such a contract, it is not a bet made with the bookmaker within the meaning of s. 15.

The position of matters is this. The company is the proprietor of a club building where a club called the Stadium Club is carried on, and as proprietor of the building and of the club it takes all the club subscriptions, and pays all the club expenses, and the company makes what profit it can out of those matters. To some extent the company takes a very

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large share in the management of the club; it has the right to nominate their directors and half the members of the club committee; but it is not in any sense the club, which consists of members who, through their committee, are entitled to manage the ordinary social enterprises of the club. By rule 36 the general committee of the club is the body which makes by-laws, such by-laws "as they shall from time to time think necessary or desirable either for the internal management and well-being of the Club or generally in relation to any matters connected with the user of the club-house or affecting the rights or interests of the members of any class as members of the Club, and every such by-law (unless expressly limited in operation) shall be binding upon all the members of the Club"; and I assume that the by-laws contained in document No. 8, which was used as evidence in this case, are by-laws made by the committee of the club, and that they are by-laws which are intended to be regulations as between the different members of the club.

The members of a club may, if they so choose, have a card room; they may make rules with regard to the management of the card room; and even though the club itself should intervene for the purpose of regulating the carrying out of those rules, it could not be said that a game of cards was played between the members and the club. In the same way it seems to me that you must look at the by-laws in order to ascertain what the transaction is into which a member is entering when he sends in a voucher in order to take part in the pool. It seems to me that from the contract which he makes by putting in his voucher you cannot eliminate the second paragraph on the first page of the document called "Pool Members' Bye-Laws," which is of the essence of the transaction, each of the members being told, "The club is not contracting with you; the club is merely acting as a distributing agent on behalf of the other members of the club, or rather on behalf of the members of the pool." It is quite true that the machinery whereby those who lose are forced or are enabled or compelled to pay their losings into the pool is provided for by the rules which make the

club manage the pool, and as managers of the pool pay out the moneys which ought to be there every Saturday, whether they have in fact collected them or not. It does not seem to me that the mere fact that on behalf of the club members the company manages the undertaking constitutes them a party to the bet. It matters of course to the management whether the members of the club who owe money to the pool are or are not solvent, but the result of each race is a matter of no consequence to the management. It does not lose if horse A. wins ; it does not win if horse B. wins the race ; it merely acts as the distributing agent to enable the losers to pay the money which they have lost into the pool for the benefit of those who have won. The transaction is not an ordinary bet ; it is a peculiar kind of bet which has become known in this country only in the last few years. Most bets are made between one man A. and another man B. ; this bet is made between one man and a number of other men, who do not undertake to pay the bet direct to the first bettor, but do undertake with him that they will pay it into a pool which is going to be distributed by the distributing agent. I cannot read these rules without seeing that they constitute a contract whereby a bet is made between one member and the other members of the pool, and that the carrying out of that bet is managed either by the club or by the company, and the fact that they have sufficient faith in the pool members to pay on behalf of the losers what the losers have to pay, and to look to the losers to recoup them in the future, does not seem to me to make them contractors with the betting members. I do not see why one should not say, in a matter of this kind, as in all other questions of contract, that where the contract is in writing you must look to the written contract to ascertain what are the rights of the parties. Looking to these rules contained in the pool members' by-laws, it seems to me quite clear that the transaction is a transaction between the members inter se.

A second point was made by the Attorney-General. He says : Even if the bet is not a bet with the company, still the company is within the definition clause in the Act of

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Parliament a "bookmaker," and as the bet is made through the intermediary of the company, it is a bet made with a bookmaker within the meaning of s. 15. In my construction of the section that cannot be right, because it would be impossible to apply the words which follow the words "bet made with a bookmaker," if it were intended to include a bet made through the instrumentality of a bookmaker. After providing that, "On every bet made with a bookmaker," the section goes on to say: "a duty (in this Part of this Act referred to as 'betting duty') at a rate equal to three-and-a-half per centum of the amount paid or offered, or promised to be paid to, or to the order or for the use of, the bookmaker." If a bookmaker makes a contract for and on behalf of the bettor, there is no promise of anything to be paid to the order of or for the use of the bookmaker. At any rate the bet is not a promise to pay something to the order or for the use of the bookmaker. For that reason I think the second point also fails.

In my judgment this appeal ought to be allowed.

RUSSELL L.J. I agree with Greer L.J. and differ with regret from the Master of the Rolls and from Rowlatt J. In the remarks which I am about to make I propose drawing no distinction between the company and the club, and I will also assume that the admission made by the company was correctly made, that the club or the company does fall within the definition of "bookmaker" contained in s. 18 of the Finance Act, 1926.

In my opinion these pool members' by-laws, which have been discussed in great detail before us, constitute a contract between the pool members of the club inter se, and after a consideration of those by-laws I have come to the conclusion that they show quite clearly that what is contemplated is the division of a fund provided by the investing members amongst those of them who have selected either the actual or the hypothetical winner of a race. I use the latter expression in view of the provision of pool rules Nos. 12 to 15 inclusive. I need not read them, but they provide that

if the actual winner of a race has not in fact been selected by any investing pool member, the pool members who have selected the horse which is second in the race will receive the total pool.

For convenience, and as a matter of machinery, the company in fact pays in the first instance on every Saturday the accounts of the winning pool members in respect of the week's racing ending and including the previous day. The company relies no doubt on the losing pool members paying up their indebtedness to the pool in due course, but in the first instance as a matter of fact the accounts of the winning pool members are paid by the company, and no doubt before they have received from the losing pool members of that particular week the amount of their indebtedness to the pool in respect of that week.

I have assumed that the pool by-laws include the first page of the document before us, although I think there is some doubt as a matter of construction as to whether the first page of the document contains any of the by-laws; but I will assume that it does. The important provisions on the first page are three. In No. 1 it is stated that "Winning members will receive any money due to them on settling day—Saturday." No. 2 is: "The Club acts simply as a distributing agent." No. 5 is: "The whole process, from receipt of the voucher until the declaration of the dividend, being automatic, the possibility of fraud and collusion is totally eliminated," the important words in that provision to my mind being the words "the declaration of the dividend." Then turning over the page, under the heading of "Accounts," I refer to No. 1, where the phrase is: "Members who on Friday night owe 2*l.* or over to the winning pool members must pay before making any further use of the Club Pool." A similar expression will be found in the next rule, No. 2. No. 3 contains the phrase, "Any member indebted to the Club or pool for 14 days or over after being notified," and so on, and that phrase is intelligible, because in the first instance the member is indebted to the pool, but if in point of fact he has not paid up his indebtedness to the pool and the

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company have meanwhile paid the winning members' accounts, then he could be described as being "indebted to the Club."

Then turning to the pool rules, Nos. 12, 13, 14 and 15 are of importance, because they clearly provide for the division of the pool among investors; and finally Nos. 22, 23, 24 and 25 all contain the same expressions, showing that what is contemplated is the division of this fund provided by the members themselves. The only phrase contrary to that is the statement in No. 1 on the first page, that "Winning members will receive any money due to them on settling day."

Upon a consideration of the rules as a whole I have come to the conclusion that there is no liability as between the company and the investing members. Certainly there is no primary liability upon the company. Putting the case at its highest, this might be said: that there is a liability on the company to guarantee the payment up by the losing pool members, and I am willing to assume, against my view, that that is so in the present case. Nevertheless, even accepting the view that there is this liability to guarantee the solvency of, or the payment up by, the losing pool members of their indebtedness to the pool, I am unable to find that the case falls within the Act. Turning to s. 15, the phrase is this: "On every bet made with a bookmaker a duty .... at a rate equal to three-and-a-half per centum of the amount paid or offered, or promised to be paid to, or to the order or for the use of, the bookmaker."

In my opinion, to attract that tax, the bet must be made with a bookmaker, and it must be such that some amount is paid or offered to be paid or promised to be paid to the order of or for the use of the bookmaker. I am unable to fit the facts of the present case to the section. In my opinion, there is no bet made here by anybody with the company or with the club. The whole foundation of this pool is that the investing pool members shall themselves constitute the fund, which is to be divided among such of them as are successful in accordance with the pool rules.

Then the Attorney-General puts the case in another way. He says this: that the company, or the club, being admittedly a bookmaker within s. 18 of the Act as being a person negotiating bets—not making them, but negotiating them—you must then read back into s. 15, sub-s. 1 (*a*), that the phrase "a bet made with a bookmaker" must include a bet negotiated by a bookmaker. In my opinion that is a wrong interpretation to put upon s. 15. In order to attract the tax imposed by that section the "bookmaker" with whom the bet is made must be the same person as the bookmaker to whom or to whose order or use money is paid or offered or promised to be paid: and there must be a bet made with a bookmaker.

The result is that I agree with Greer L.J. that this appeal succeeds.

Appeal allowed.

Solicitors for company: *De Buriatte & Bowen.*

Solicitor for Attorney-General: *Solicitor for Customs and Excise.*

W. I. C.

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BARBER, WALKER & COMPANY, LIMITED *v.* FLINT.

Employer and Workman—Compensation for Injury—Agreement—Weekly Payments—Review—Change in Circumstances—Event contemplated by Agreement—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sch. I., s.* 16.

A collier being partially incapacitated by an accident arising out of and in the course of his employment, entered into an agreement with his employers by which, after reciting that the workman's average weekly earnings for twelve months before the accident were 3*l.* 19*s.* 4*d.*, it was agreed that the employers should find him suitable employment and pay him the wages which he could earn therein and, in addition to those wages in each week, half the difference between his said average weekly earnings and the wages he could earn at the said employment by working while the pit was at work, but not in any case exceeding 1*l.* After weekly payments under the agreement had been made for some years, the rate of wages having fallen, the employers applied to have the payments reviewed under s. 16 of the First Schedule to the Workmen's Compensation Act, 1906 :—

Held, that a change in the rate of wages, being one of the events contemplated and provided for by the agreement, was not such a change in the circumstances as entitled either party to have the weekly payments reviewed.

APPEAL from an award made by the judge of the County Court of Nottinghamshire holden at Nottingham on an application under the Workmen's Compensation Act, 1906, by the employers, who were colliery proprietors, to review weekly payments of compensation made under an agreement entered into on October 25, 1922, and registered on January 10, 1923, between themselves and one of their workmen in the following circumstances :—

The workman, Joseph Flint, was a collier in the employment of the applicants. On December 15, 1919, he was injured by an accident arising out of and in the course of his employment. At the date of the accident he was thirty-seven years of age; his average weekly earnings were 3*l.* 19*s.* 4*d.* He was totally incapacitated until October 18, 1921, and received the maximum amount of compensation—namely, 1*l.* a week up to that date. From that date till October 24, 1922, during which time he was partially incapacitated, he received half the difference between the

amount of his average weekly earnings before the accident and the average weekly amount he was earning in a suitable employment after the accident—namely, working at the screens. This difference was agreed to be 1*l.* a week.

On January 10, 1923, the following agreement was registered in the county court :—

"Be it remembered :—

"That on December 15, 1919, personal injury was caused at Brinsley Colliery to the above named Joseph Flint by accident arising out of and in the course of his employment.

"And that on October 25, 1922, the following agreement was come to by and between the said Joseph Flint and the above named Barber, Walker & Co., Ld. (hereinafter called 'the Company'), that is to say :—

"That the average weekly earnings of the workman during the twelve months prior to the said accident computed in accordance with the above mentioned Act [the Act of 1906] were 3*l.* 19*s.* 4*d.*

"That the Company should so far as they conveniently could do so find and provide at their colliery employment suitable for the said Joseph Flint and pay him the wages which he could earn at such employment, and in addition to such wages in each week pay to the said Joseph Flint as compensation under the above mentioned Act half the difference between the said average weekly earnings of the said Joseph Flint and the wages which he can earn at such employment by working pit time but not in any case exceeding 1*l.*

"And the said Joseph Flint agreed to accept the said terms, such agreement to be subject to review at the request of either of the said parties subject to the provisions of s. 16 of the First Schedule to the above mentioned Act."

Under this agreement the workman continued to receive and was at the date of these proceedings receiving compensation at the rate of 1*l.* a week.

On July 19, 1928, the employers applied to the county court for diminution of the weekly payment of 1*l.* on the ground that the workman was then able to earn in some suitable employment or business, including the work found for him

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by the applicants, an average weekly sum, the difference between which sum and the average weekly earnings before the accident did not, in all the circumstances of the case, including the fall in the rate of wages, entitle the respondent to compensation at the rate of 1*l.* a week. On the hearing of the application they gave evidence that in 1919 the wages of miners were very high, and that a man who was then earning 3*l.* 19*s.* 4*d.* a week would not now earn more than 2*l.* 14*s.* a week. And they contended that this was a change in the circumstances which entitled them to have the weekly payment reviewed under s. 16 of the First Schedule to the Act of 1906.

The county court judge dismissed the application on the ground that there had been no change of circumstances except such as had been expressly provided for by the agreement.

The applicants appealed.

Cave K.C. and *Dale* for the appellants. There can be no doubt that a general reduction in wages is a matter to be taken into account by an arbitrator in making an award: *Bevan* v. *Energlyn Colliery Co.* (1) What applies to payments under an award applies to payments under a recorded agreement: *Tyne Tees Shipping Co.* v. *Whitlock.* (2) "Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum" provided by the Act, "and the amount of payment shall, in default of agreement, be settled by arbitration under this Act": First Schedule to the Act of 1906, s. 16. The agreement was made at a time when the respondent uninjured could earn 3*l.* 19*s.* 4*d.* Now he could uninjured earn 2*l.* 14*s.* It is not disputed that some change in the circumstances is necessary to entitle an applicant to a review of weekly payments, whether made under an award or under an agreement; but it is submitted that this change in the rate of wages is a sufficient change.

(1) [1912] 1 K. B. 63. (2) (1913) 6 B.W. C. C. 559, 564, 565.

Shakespeare for the respondent. There is a great difference between an award and an agreement. An award could not, under the Act of 1906, provide for future events: *Newhouse & Co.* v. *Johnson* (1); but an agreement may do so: *Taylor* v. *London and North Western Ry. Co.* (2) and often does, one of its objects being to avoid frequent applications for review of the payments made under it. One of the future events contemplated and provided for by this agreement was a change in the circumstances; the very change which has taken place, a general reduction in wages. A change contemplated and provided for is not such a change in circumstances as to warrant a review of an agreement.

Cave K.C. in reply.

SCRUTTON L.J. This is an appeal by the employers against the refusal of a county court judge to review an agreement for compensation entered into between the employers and one of their workmen. The workman in 1919 met with an accident to his thigh. He worked for some time on light work, and on October 25, 1922, the parties came to an agreement. [The Lord Justice read the agreement of that date down to and including the words "not in any case exceeding 1*l.*," and proceeded:] The amount of 1*l.* is the limit imposed by the Act of 1906, but s. 3 of the First Schedule to that Act does not require an arbitrator to give a fixed proportion of the difference between the average weekly earnings of the workman before the accident and the average weekly amount which he is able to earn in some suitable employment after the accident; the sub-section provides that the weekly payment "shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper"; and it has been decided both in this Court and in the House of Lords that in ascertaining what portion of the difference shall be awarded the arbitrator may take into account a rise or a fall in general wages. But, though s. 3 of the Schedule does not specify one-half of the difference as the proper amount, the Act frequently proceeds on the view that one-half of the

(1) (1911) 5 B. W. C. C. 137. (2) [1912] A. C. 242.

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risk should be borne by the employer and one-half by the workman, and that the workman should not necessarily have the full amount of the difference. The agreement goes on to state that "the said Joseph Flint agreed to accept the said terms, such agreement to be subject to review at the request of either of the said parties."

In July, 1928, the employers took out a summons to review the payments under this agreement. They did not contend that the agreement was contrary to the Act; they went on the basis that in all the circumstances, including the fall in wages, the workman ought not to receive as much as 1*l.* a week, the amount he was receiving by virtue of the provision that he should not have more than 1*l.* The county court judge came to the conclusion that the agreement provided for all the events that had happened, and that no new event had occurred but such as was contemplated by the parties when they made the agreement, and was provided for by its terms, and therefore that there was no change in the circumstances such as to entitle the employers to review the payments. It is well settled that in order to justify a review of weekly payments, whether under an award or under an agreement, there must be some change of circumstances since the date of the award or agreement; for it is to be supposed that the award or agreement was made with a knowledge of the circumstances existing at the time of making it.

In my opinion this agreement did contemplate the possibility of a future rise or fall in wages, and provided for either event by allowing the workman half the difference between what he was earning before the accident and the wages he was able to earn after the accident. The only difference between that and the statutory provision is that, whereas the statute allows the workman that proportion of the difference which a county court judge thinks he ought to receive, the agreement allows him half the difference. The only change of circumstances is that the general rate of wages has fallen, so that an uninjured workman may earn less since the accident than an injured workman might have made before it. Obviously that was just the sort of change which the parties had in

mind when they made the agreement; they made it in order to prevent continual applications by one side or the other, according to circumstances, by agreeing upon an average amount fair to both sides. Suppose the agreement had provided for a scale of compensation varying with the rise or fall of weekly wages; for example, so much compensation if the weekly wages were 4*l.*, so much if they were 3*l.* 10*s.*, so much if they were 3*l.*, and so on; that would be a perfectly good agreement, in my view. I cannot think that in such a case it would be open to the employer to have the payment of compensation reviewed on the ground that the rate of wages had gone down to 3*l.*, because that would be an event which was contemplated by the parties when they agreed upon the scale of compensation. Without assuming to lay down rules regulating the review of payment under these agreements, I am of opinion that a change in the general rate of wages, contemplated by the parties and provided for in this agreement, is not such a change as justifies the employer in applying to review the payments to be made under it. The appeal must be dismissed.

LAWRENCE L.J. I have come to the same conclusion. There is no doubt that a weekly payment arrived at by agreement may form the subject-matter of review under s. 16 of Sch. I. to the Act of 1906, in the same manner as a weekly payment arrived at by an award. Moreover, in the present case the agreement contains an express provision that it is to be subject to review at the request of either party under s. 16, meaning of course that the weekly payment agreed upon may be reviewed under that section.

It is settled that, in order to entitle either the employer or the workman to a review, there must be a change in the circumstances since the weekly payment was awarded or agreed upon. Has there been a change in the circumstances since the date when this agreement was made? It is true that the rate of wages has fallen. That fall would, no doubt, be a sufficient change in the circumstances to justify a review, but for one thing—namely, that in the present case that very

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event is expressly provided for. It is not suggested by either party that a provision for such an event invalidates the agreement. The agreement is so worded as to cover and provide for a change in the rate of wages, such as has taken place here, and, it being conceded that the agreement is valid, it seems to me to follow that the change in the rate of wages is not such a change in the circumstances within s. 16 as to entitle either of the parties to a review. The learned county court judge seems to have taken that view and to have held on the construction of the agreement that in this case there was no such change, within the meaning of the authorities, as would entitle the appellants to review the payments. I agree with him, with the result that the appeal fails.

SANKEY L.J. I agree, and have nothing to add.

Appeal dismissed.

Solicitors for appellants: *Johnson, Weatherall, Sturt & Hardy, for Parker Rhodes & Co., Rotherham.*

Solicitors for respondent: *Taylor, Jelf & Co., for E. S. Buxton Hopkin, Mansfield.*

W. H. G.

THE KING *v.* COUNTY OF SOUTHAMPTON CONFIRMING COMMITTEE.

Ex parte SLADE.

K. B. D.
1928
July 19.
C. A.
Nov. 9.

Licensing—Removal of Licence—Order by Justices—Application to confirm—Refusal of Confirming Committee on Ground of Loss of monopoly Value—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *and* 1 *Geo.* 5, *c.* 24), *s.* 26.

On an application to the confirming committee to confirm an order of removal of a licence granted by licensing justices, the committee have jurisdiction to refuse confirmation on the sole ground that thereby the applicant would make a substantial pecuniary gain, and the public would lose the benefit of the monopoly value which would be payable if a new licence were applied for and granted.

RULES NISI for certiorari and mandamus.

The prosecutor, William Slade, was the licensee of the "Bird in Hand" public house, Fareham, which had an old beerhouse on-licence. The owners of the house had provided a new site, and accordingly the prosecutor applied to the justices for a removal of the licence, and on March 5, 1928, the justices, twelve in number, unanimously granted the application, which was strongly supported by the police on the ground that the removal would be in the interest of the neighbourhood. On April 25, 1928, the confirming committee, to whom quarter sessions had delegated their duties as confirming authority, refused the application to confirm the removal, although it was unopposed. They did so on the ground that the pecuniary gain to the brewers and the tenant, if the application were granted, would be considerable, and that the monopoly value of the new premises, which would be substantial, would be lost to the public if the matter were dealt with by way of removal order.

The prosecutor then obtained these rules calling on the confirming committee to show cause why their order should not be quashed and why they should not hear and determine his application according to law.

Blake Odgers showed cause. The committee had power to refuse to confirm the justices' grant of the order of removal on the ground only of the loss of monopoly value. In so doing

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they had relied on the words of Lord Alverstone in *Rex* v. *Drinkwater* (1): "I wish, however, to say that I do not indicate or suggest that the justices have not a discretion as to whether they will, or will not, make an order sanctioning the removal; and, speaking for myself, I think they are entitled and ought to take into consideration the circumstance, if it exists, that by making the order a great pecuniary gain would be conferred upon the applicant, and the public would lose that pecuniary gain, which might have been preserved to them if the application had been for the grant of a new licence. It must not be thought, therefore, that I suggest that the justices have not a discretion to refuse to make a removal order upon that ground amongst others. It is a matter for them to take into consideration; but they must consider it with reference to the question of making or refusing the removal order, and they must not attach conditions which they have no power to attach under the statute." That is exactly what the committee did in the present case. This is not the case of their seeking to confirm the order subject to conditions; they were saying in effect to the applicant: "If you want a public house your proper course is to apply for a new licence." If justices may not act on a consideration of this kind, brewers could shift their licences all over the country and get what would virtually be new licences without paying monopoly value.

Sir Reginald Mitchell Banks K.C. and *Maurice F. Healy* in support. No doubt the committee had an unfettered discretion, but that discretion must be exercised reasonably, and if it appear that they have addressed their minds to improper considerations, then they have exercised their discretion unreasonably. Their duty was to go over the same ground as did the justices; the application for confirmation is, in effect, a rehearing. If the fact that the removal will confer a benefit on the licensee is a reason for its refusal, that will go far to do away with the whole machinery of removal, because a removal is nearly always asked for because it is to the applicant's advantage, and if it is for the benefit of the public it will

(1) [1905] 2 K. B. 469, 477.

naturally follow that it is for the benefit of the licensee. Lord Alverstone said in *Rex* v. *Drinkwater* (1): "An order sanctioning the removal of an existing licence involves different considerations from those which arise with respect to the grant of a new licence." To refuse confirmation on this ground is to say to the licensee: "We, the committee, cannot attach conditions to the confirmation of the justices' grant, therefore we will so deal with the matter as to produce the same result in a different way." What Lord Alverstone said (2) was obiter dictum only; had he gone into the matter at full length he might have added that only if there was some substantial gain to the applicant, apart from the mere removal, ought the court to refuse to confirm. And it is to be noted that he did not say that the justices could refuse on that ground alone, but "upon that ground amongst others." (2)

LORD HEWART C.J. It is made clear, by the affidavit of the chairman of the confirming committee, that that com mittee did direct their minds to the sort of topic which the applicant at first contended was irrelevant. It is now said, however, not that that topic—the escaping of payment of monopoly value—is irrelevant, but that it ought not to afford the sole reason for refusing to confirm the order of the licensing justices.

The law on the subject, so far as the statute is concerned, is to be found in s. 26 of the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24). It is significant that that section provides that no order of the justices authorizing a removal shall be valid unless it is confirmed by the confirming authority. Nor are any limits set by the statute to the matters which the confirming authority may take into account in deciding whether to confirm the order. It is conceded by counsel who supported the rules that the licensing justices may consider the question whether that which is asked for is practically a new licence. And when one looks at *Rex* v. *Drinkwater* (3) one finds the emphatic words of Lord Alverstone (2): "I wish, however, to say that I do not

(1) [1905] 2 K. B. 476. (2) [1905] 2 K. B. 477.
(3) [1905] 2 K. B. 469.

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indicate or suggest that the justices have not a discretion as to whether they will, or will not, make an order sanctioning the removal; and, speaking for myself, I think they are entitled and ought to take into consideration the circumstance, if it exists, that by making the order a great pecuniary gain would be conferred upon the applicant, and the public would lose that pecuniary gain, which might have been preserved to them if the application had been for the grant of a new licence. It must not be thought, therefore, that I suggest that the justices have not a discretion to refuse to make a removal order upon that ground amongst others." And Kennedy J., as he then was, said (1): "I agree with my Lord that our decision must not be taken as suggesting in any way that the justices have not a discretion with respect to the granting or refusing of the application to remove the licence. I agree so fully with the rest of my Lord's judgment that I need add nothing more." Ridley J. agreed without comment. It is said that the words quoted from Lord Alverstone's judgment were of the nature of obiter dicta. So, in a sense, they were, but they were remarkably near the topic that was then being dealt with. Sir Reginald Mitchell Banks suggests that in using the words "upon that ground amongst others" Lord Alverstone intended to say that justices could not refuse the removal solely on the ground of monopoly value. I do not think that that is the true view, but that Lord Alverstone is saying: "It must not be thought that I suggest the justices have not a discretion to refuse on that ground. On the contrary, they have. Just as they may refuse on other grounds, so also they may refuse on that ground alone." It was not intended to convey that that might not be the decisive, or the sole ground. I think, therefore, that these rules ought to be discharged.

ACTON J. I agree.

BRANSON J. I agree.

Rules discharged.

(1) [1905] 2 K. B. 477.

W. L. L. B.

Nov. 9. The applicant for the rules appealed.

Sir Reginald Mitchell Banks K.C. and *Maurice F. Healy* for the appellant. The confirming authority were wrong in refusing to confirm the order for removal on the ground stated by them. In effect they were doing what the actual decision in *Rex* v. *Drinkwater* (1) says cannot be done. The object of the removal machinery of the Licensing Acts is to ensure the better distribution of licensed houses—that is, that premises which are not a necessity in one place may be removed to another place where they are necessary for the needs of a larger population. It is difficult to imagine any one asking for a removal order if he is not to reap some advantage on obtaining it; and if, where no objection is taken to the applicant personally or to the locality to which it is proposed to remove the premises, the confirming authority can refuse their consent to the removal merely on the ground that the licensee will receive some pecuniary advantage, that is tantamount to a repeal of the removal machinery. If the new premises to which an applicant proposes to remove the licence were on a grandiose scale and quite different from the old premises, there might be some ground for considering that as an abuse of the machinery for the removal of licences. That is not the case here, and the confirming authority in refusing to confirm the removal order were not exercising their discretion judicially. The passage in the judgment of Lord Alverstone C.J. in *Rex* v. *Drinkwater* (2) relied upon on behalf of the confirming authority is wrong, and certainly was not necessary for the decision. The two parts of that judgment cannot stand together, and the passage in question should be disregarded.

Holman Gregory K.C. and *Blake Odgers* for the respondents were not called upon.

SCRUTTON L.J. This is an appeal from a refusal of the Divisional Court to grant a writ of certiorari and a writ of mandamus. The writ of certiorari was asked for to remove, for the purpose of being quashed, a decision of the confirming

(1) [1905] 2 K. B 469. (2) [1905] 2 K. B. 469, 477.

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authority for the county of Southampton on the ground that in coming to their decision the confirming authority considered matters which they ought not to have considered; and the writ of mandamus was applied for to compel the confirming authority to hear and determine the application according to law.

The matter arises in this way: there is a small licensed house at Fareham called the "Bird in Hand." The neighbourhood is not very crowded, and close to the "Bird in Hand" there is another licensed house. The licensee of the "Bird in Hand" and the brewers who own the house desire to remove the licence to a site about a quarter of a mile off, to a more crowded district where there is no other licensed house near. Obviously the effect of a removal will be that, for premises in respect of which there is no great difference in their value with and without a licence, the brewers and the licensee will obtain premises where there may be a very considerable difference between their value with and without a licence; in other words, that there will be an increase in the monopoly value. The licensing justices granted the application for the removal, but when the application came up for confirmation the confirming authority stated that they were of opinion that the pecuniary gain that would accrue to the brewers and licensee would be considerable, and that the monopoly value of the new premises, which would be substantial, would be lost to the public if the matter were dealt with as one of removal instead of by an application for a new licence, and accordingly they refused to confirm the removal order. Thereupon the application was made for a writ to quash their order of refusal on the ground that it was not open to them to refuse to confirm a removal order simply because the payment of monopoly value would be avoided to the detriment of the public.

A removal order under s. 24 of the Licensing (Consolidation) Act, 1910, has to be authorized by the licensing justices, who have a discretion in the matter, and by s. 26 no such order is to be valid unless confirmed by the confirming authority, who have exactly the same discretion. "Discretion,"

as defined by Lord Halsbury in *Sharp* v. *Wakefield* (1), means that "something is to be done according to the rules of reason and justice, not according to private opinion: *Rooke's Case* (2); according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular." In order to succeed the appellant must therefore say that it is contrary to the rules of reason and justice, or that it is contrary to law, that the confirming committee should say that if the removal is sanctioned the brewers will get a large increase of the monopoly value without paying anything to the public for it. On this question we have a certain amount of guidance from the decision of the Divisional Court in *Rex* v. *Drinkwater*. (3) There the licensing justices made an order for the removal of a licence subject to a condition that the monopoly value should be paid. The Divisional Court, following *Reg.* v. *Bowman* (4), in which it was held that the licensing justices could not annex to the grant of a licence a condition for the payment of money by the applicant, decided that the justices had no power to affix to the making of an order for removal a condition that the monopoly value should be paid; but Lord Alverstone C.J. in the course of his judgment said that he did not intend to indicate or suggest that the justices might not take into consideration the circumstance that a great pecuniary gain would be conferred upon the applicant, and that the public would lose that pecuniary gain, which might have been preserved to them if the application had been for the grant of a new licence. Kennedy J. agreed with that expression of opinion and so did Ridley J. There is therefore nothing in that decision itself to prevent the justices or the confirming authority taking into account the fact that the removal of this licence will involve a considerable increase in the monopoly value to the applicant and owners without the public receiving any part of it. It is impossible in these circumstances to say that it is contrary to reason and justice that the confirming authority should consider that matter, which is one which

(1) [1891] A. C. 173, 179.
(2) (1598) 5 Rep. 100a.
(3) [1905] 2 K. B. 469.
(4) [1898] 1 Q. B. 663.

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should eminently be considered having regard to reason and justice. It is equally impossible to say that it is contrary to law that the confirming authority should take that into account with the other circumstances in considering whether or not they shall grant or refuse the order for removal. I quite understand that in some cases the licensing justices or the confirming authority may think that it is an advantage to the public to get rid of a licensed house in a particular place, and they may put that circumstance against the loss to the public of the monopoly value on the removal. In the entirely imaginary case put by Mr. Healy in the course of the argument of a public house in the centre of a town at awkward cross roads where motors may be much embarrassed, and the desirability of getting rid of it by transferring it to what he called the virgin soil of another part of the town, I can quite understand that the justices might say that they would sacrifice the monopoly value in order to get a clearer thoroughfare and so benefit the public. But I am quite unable to say that it is contrary to reason or justice or law for the justices to say: "We consider the fact that if we grant this removal we shall be giving a large increase of monopoly value to the brewers without the public benefiting; in these circumstances we decline to sanction the removal, and we leave the applicant to apply for a new licence." For these reasons, which, substantially, are the same as those of the Divisional Court, I think the rules were properly discharged, and that the appeal fails.

LAWRENCE L.J. I agree. In *Rex* v. *Drinkwater* (1) it was held that s. 4, sub-s. 2, of the Licensing Act, 1904—now replaced by s. 14 of the Licensing (Consolidation) Act, 1910—giving power to justices to attach conditions to the grant of new licences in order to secure to the public the monopoly value, does not apply to an order for the removal of a licence, and that licensing justices have no power to attach those conditions to the making of an order for removal. That decision has stood unquestioned for over twenty years. Moreover, five years after that decision was given the Licensing

(1) [1905] 2 K. B. 469.

(Consolidation) Act, 1910, was passed, which re-enacted in the same language the section to which I have referred, and in my opinion Mr. Healy was right in his contention that the following passage in the judgment of James L.J. in *Ex parte Campbell* (1) applies to the present case—namely, "Where once certain words in an Act of Parliament have received a judicial construction in one of the superior Courts, and the Legislature has repeated them without any alteration in a subsequent statute, I conceive that the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them." Therefore, whatever may be my own opinion as to the correctness of *Rex* v. *Drinkwater* (2), it is the duty of this Court to give effect to s. 14 of the Act of 1910 according to the construction placed by that decision upon the corresponding section in the earlier Act. That being so, the question resolves itself into whether, although the justices have no jurisdiction to make an order for the removal of a licence subject to a condition as to payment of monopoly value, they are entitled to refuse an order for removal upon the sole ground that, if granted, it would confer a pecuniary gain upon the applicant, and, accordingly, to hold that the applicant ought to apply for a new licence and pay the monopoly value. Sir Reginald Mitchell Banks contended that the refusal of a removal order on such a ground was not a proper exercise by the confirming authority of the discretion conferred upon them by the Act, as it would in effect be indirectly doing that which *Rex* v. *Drinkwater* (2) has said that they cannot do. In my judgment that contention is not well founded. Lord Alverstone C.J., in giving the leading judgment in *Rex* v. *Drinkwater* (2) (in which judgment Kennedy and Ridley JJ. concurred), expressly explained that although no condition such as was sought to be imposed in that case is proper to be imposed, the licensing justices in exercising their discretion as to granting or refusing the removal of a licence were entitled and ought to take into consideration the fact that if the removal were sanctioned, a great pecuniary gain would be conferred upon the applicant

(1) (1870) L. R. 5 Ch. 703, 706. (2) [1905] 2 K. B. 469.

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the benefit of which would be lost to the public. I agree with Scrutton L.J. in understanding that to mean that the licensing justices may properly take that ground into consideration, although it may be the only ground of objection to the making of the removal order. In the present case the confirming authority have by their affidavit stated frankly that this was the only ground of their decision, and being in my judgment a good ground, their decision ought not to be disturbed. For these reasons I agree that the appeal fails and must be dismissed.

SANKEY L.J. I agree. The question is, can it be said that the confirming authority did not exercise their discretion properly ? The answer to that question was given in *Rex* v. *Drinkwater* (1), where Lord Alverstone C.J. in giving judgment said this (2) : " I wish, however, to say that I do not indicate or suggest that the justices have not a discretion as to whether they will, or will not, make an order sanctioning the removal ; and, speaking for myself, I think they are entitled and ought to take into consideration the circumstance, if it exists, that by making the order a great pecuniary gain would be conferred upon the applicant, and the public would lose that pecuniary gain, which might have been preserved to them if the application had been for the grant of a new licence." Sir Reginald Mitchell Banks says that that statement is obiter, and therefore we ought not to pay any attention to it. I do not regard the statement as obiter. I regard it as explaining what Lord Alverstone meant in giving judgment upon the point involved in the case. Mr. Healy was bolder than his leader and said that the passage in question is bad, and, therefore, although part of the judgment is good, this part is bad. I cannot accept that argument. The decision has stood for nearly a quarter of a century. To that I do not attach so much importance, but there is something more, because since that decision was given a new Act of Parliament has been passed—the Licensing (Consolidation) Act, 1910—which re-enacts the material section of the old Act, and I think that this Court should be slow to interfere with a decision which

(1) [1905] 2 K. B. 469. (2) [1905] 2 K. B. 477.

has stood the test of time, and, secondly, which has been ratified by Act of Parliament. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors showing cause: *Robbins, Olivey & Lake, for F. V. Barber, Winchester.*

Solicitors for the rules: *Godden, Holme & Ward, for Hobbs & Brutton, Portsmouth.*

J. S. H.

BALDWIN AND OTHERS *v.* ELLIS AND OTHERS.

1928
Nov. 2.

Local Government—Rural District Council—Election—Nomination Paper—Omission of Name of Parish for which Candidate was qualified as Local Government Elector—Validity of Nomination Paper—Ballot Act, 1872 (35 *&* 36 *Vict. c.* 33), *s.* 13—*Municipal Corporations Act,* 1882 (45 *&* 46 *Vict. c.* 50), *s.* 72—*Local Government Act,* 1894 (56 *&* 57 *Vict. c.* 73), *ss.* 20, 24, 48—*Rural District Councillors Election Order,* 1898 (*St. R. & O.* 1898, *No.* 2), *dated January* 1, 1898, *rr.* 4, 33.

The nomination papers of four persons nominated for election as rural district councillors merely stated in column 5, under the heading "How qualified," that the persons nominated were "Local Government electors," and did not state the name of the parish for which they were qualified as local government electors, as required by r. 4 of the Rural District Councillors Election Order, 1898. The deputy returning officer rejected the nomination papers as being invalid, because the parish within the poor law union for which qualification was claimed was not stated. Upon an election petition:—

Held, that the omission to state in the nomination paper the name of the parish for which the person nominated was qualified as a local government elector was a non-compliance with the requirements of r. 4 of the Rural District Councillors Election Order, 1898. That defect was not cured by s. 13 of the Ballot Act, 1872, because that section only applied to a case where there had been a wrongful admission of a nomination paper, and did not apply to a case where a nomination paper had been rejected. Neither was the omission an "inaccurate description" of the person nominated within r. 33 of the Order of 1898, but was a non-compliance with the requirements of r. 4 of that Order, and therefore was not cured by r. 33.

Gothard v. *Clarke* (1880) 5 C. P. D. 253 and *Reg.* v. *Tugwell* (1868) L. R. 3 Q. B. 704, 711 followed.

Marton v. *Gorrill* (1889) 23 Q. B. D. 139 distinguished.

SPECIAL CASE stated in an election petition under the Municipal Corporations Act, 1882, and the Local Government Act, 1894, by the petitioners and the respondent E. J. F. Leatherby

1928

BALDWIN v. ELLIS.

for the opinion of the High Court of Justice, and settled by Master Jelf pursuant to the order of McCardie J.

(1.) For the election appointed to be held on April 2, 1928, to elect four rural district councillors for the Western Ward of the Rural District of Plympton St. Mary in the county of Devon nomination papers were delivered to the deputy returning officer in respect of nine candidates—namely, Stephen Baldwin, Cyril Henry Crews, Ernest Howard and William Edward Turpin (hereinafter referred to as "the four petitioners"), Engineer Captain Frederic William Sparrow, Walter James Henry Ellis, Edward James Frank Leatherby, Hugh Gordon Murdoch and William George Friscott.

(2.) The nomination papers of the four petitioners were duly delivered to the deputy returning officer on March 14 and 15, 1928. A copy of a specimen nomination paper was annexed to the case, and so far as material was as follows :—

FORM OF NOMINATION PAPER.

Rural District of Plympton St. Mary.

Election of Rural District Councillors for the Western Ward of the Parish of Plympton St. Mary in the year 1928.

We, the undersigned, being respectively Local Government Electors of the said Ward do hereby nominate the undermentioned person as a candidate at the said election.

Name of Candidate.		Place of Abode.	Description.	How qualified. (*Specify qualification according to direction in Instruction* 5.)
Surname.	Other Names in Full.			
1	2	3	4	5
Crews	Cyril Henry	Bovingdon Villas, Plympton St. Mary.	Maltster	Local Government Elector.

Signature of Proposer	Signature of Seconder
Place of Abode	Place of Abode

Instructions for filling up nomination paper.

(5) If the candidate is a Local Government Elector of some Parish within the Union in which the Rural District or the part of the Rural District comprising the Parish is situate (that is, if his or her name is registered in the Local Government Register of such Parish) insert in column 5 "Local Government Elector of Parish of ." If the candidate has during the whole of the twelve months preceding the election resided in the Union, insert in column 5 "Residence." If the candidate has not during the whole of the twelve months preceding the election resided in the Union, but is qualified to be elected for some municipal borough wholly or partly situate in the Union, insert in column 5 "Qualified to be elected Councillor of Borough of ." If the candidate is the owner of property held by freehold, copyhold, leasehold or any other tenure within the Rural District, insert in column 5 "Ownership of Property." . . . .

(3.) On March 17, 1928, each of the four petitioners received by post from the deputy returning officer a notice, the material parts of which were as follows: "I hereby give you notice that I have decided that the nomination paper received by me nominating you as a candidate for election as a rural district councillor for the above named ward is an invalid nomination for the following reason. 'The parish within the poor law union for which qualification is claimed is not stated.'"

(4.) The said Engineer Captain Frederic William Sparrow, on March 19, 1928, withdrew his candidature, and by a public notice dated April 3, 1928, the returning officer declared that the said Walter James Henry Ellis, Edward James Frank Leatherby, Hugh Gordon Murdoch and William George Friscott were elected rural district councillors for the said ward, there being no poll.

(5.) Each of the four petitioners was a local government elector for the parish of Plympton St. Mary.

(6.) The number of local government electors for the West Ward of Plympton St. Mary was about 1900, and the four petitioners were all well known residents, who had resided there during the qualification period.

(7.) The deputy returning officer knew that the four petitioners were all entitled to be local government electors, but he did not know whether they were in fact on the register as such and did not look to see.

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The question for the consideration of the Court was: Whether the nomination of each of the four petitioners was invalidated by reason of the facts above stated, on the ground that his nomination paper did not state in column 5 thereof the name of the parish for which he was qualified as a local government elector.

If this question was answered in the affirmative the petition was to be dismissed.

If this question was answered in the negative the election of the said Walter James Henry Ellis, Edward James Frank Leatherby, Hugh Gordon Murdoch and William George Friscott was to be declared null and void.

J. L. Pratt for the petitioners. The deputy returning officer was wrong in rejecting the nomination papers. The omission of the name of the parish for which the person nominated was qualified as a local government elector was a mere clerical slip which did not mislead any one. It is true that r. 4 of the Rural District Councillors Election Order, 1898, requires that each candidate for election as a rural district councillor shall be nominated in writing, and that the nomination paper shall state "the surname and other name or names in full of the candidate, and his place of abode and description, and whether he is qualified as a parochial elector of some parish within the poor law union in which the rural district or the part of the rural district containing the parish or other area is comprised." But it was intended to give some latitude, because the rule ends with the words: "It [the nomination paper] shall be in the form set out in the notice in the Form No. 1 in the Second Schedule to this Order, or in a form to the like effect." The Local Government Act, 1894, under which the Rural District Councillors Election Order, 1898, was framed by the Local Government Board, provides by s. 48, sub-s. 3, that "at every election regulated by rules framed under this Act, the poll shall be by ballot, and the Ballot Act, 1872, . . . shall . . . . apply in like manner as in the case of a municipal election." Sect. 13 of the Ballot Act, 1872, provides that "no election shall be declared invalid

by reason of a non-compliance with the rules contained in the First Schedule to this Act, or any mistake in the use of the forms in the Second Schedule to this Act, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in the body of this Act, and that such non-compliance or mistake did not affect the result of the election." If one looks at the earlier sections of the statute it is evident that the word " election " is used in a very loose sense. It is used in s. 13 in two different senses—namely, the process and also the result of the election. The defect in the nomination papers in the present case is cured by that section. It must be admitted that the Court in *Gothard* v. *Clarke* (1) did not adopt that view, and held that s. 13 of the Ballot Act, 1872, did not apply to any question arising before the returning officer, but referred to a time subsequent to a return by the returning officer when the election was completed. But the Court in *Marton* v. *Gorrill* (2) held that the omission of the name of an electoral division of a county on the nomination paper of a person nominated as a candidate at an election of a county councillor for that division was a " mistake in the use of the form " within s. 72 of the Municipal Corporations Act, 1882, and did not affect the validity of the nomination. That section has not been incorporated in the Local Government Act, 1894, and therefore is not directly applicable in the present case, but the language of the section is very similar to that of s. 13 of the Ballot Act, 1872, because it provides that " an election shall not be invalidated by non-compliance with the rules in the Third Schedule, or mistake in the use of the forms in the Eighth Schedule, if it appears to the Court having cognizance of the question that the election was conducted in accordance with the principles laid down in the body of this Act." In that case Mathew J. refused to construe " election " as " complete election," and expressed the view that the use of an inaccurate form in the course of the election was provided for by the section. He distinguished *Gothard* v. *Clarke* (1),

(1) 5 C. P. D. 253. (2) 23 Q. B. D. 139.

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and said that that decision stood alone. In any event, r. 33 of the Rural District Councillors Election Order, 1898, provides that "no misnomer or inaccurate description of any person or place named in any notice or nomination paper under this Order shall hinder the full operation of such notice or paper with respect to that person or place, provided the description of that person or place is such as to be commonly understood." The omission of the name of the parish for which the person nominated is qualified as a parochial elector cannot be said to be a misnomer, but is an inaccurate description of that person, and comes within that rule, and therefore the deputy returning officer ought not to have rejected these nomination papers. Rule 33 came into existence subsequently to the decision in *Marton* v. *Gorrill* (1), and a narrow interpretation ought not to be given to it. Mathew J. said in *Marton* v. *Gorrill* (1) that the omission of the name of the electoral division from the nomination paper "was clearly an inaccuracy in the form." In order that a description of a person should be an accurate description it must be a detailed description; here part of the description was omitted. It is found in the case that the four petitioners were all well known residents, and that the deputy returning officer knew that they were local government electors, but that he did not know whether they were on the register and did not look to see, as he might have done.

Willoughby Williams for the respondent. The deputy returning officer was right in rejecting these nomination papers. The candidates were described in them merely as local government electors; that might mean local government electors for any parish in England or Wales, whereas r. 4 of the Rural District Councillors Election Order, 1898, requires that the nomination paper shall state that the candidate is a parochial elector of some parish within the poor law union in which the rural district is comprised. To make the matter quite plain the instructions set out at the foot of the nomination paper direct that column 5 shall be filled up by inserting the words "Local Government elector of parish

(1) 23 Q. B. D. 139.

of——" leaving a blank in which the name of the parish is to be inserted. In the present case there was neither a misnomer nor an inaccurate description of the person nominated within r. 33 of the Order of 1898, but a total omission of one of the particulars of description required by r. 4 of that Order. It was held in *Reg.* v. *Tugwell* (1) that the total omission of description required by s. 32 of 5 & 6 Will. 4, c. 76, on voting papers was not cured by s. 142 of that Act as being an inaccurate description. Cockburn C.J. there pointed out that as 22 Vict. c. 35 required the same particulars in a nomination paper, the same question might arise on the nomination paper, and the same construction must apply to both, and in the case of a nomination paper it was of great importance to have strict accuracy. It was contended for the respondent in *Marton* v. *Gorrill* (2) that there was no "misnomer or inaccurate description" within the meaning of s. 241 of the Municipal Corporations Act, 1882, but an "omission," and *Reg.* v. *Tugwell* (1) was cited in support of that argument. The Court, while allowing the petition, decided the case under s. 72 of the Act of 1882, and therefore they could not have considered the "omission" in that case was an "inaccurate description." Mathew J. pointed out in *Marton* v. *Gorrill* (2) that the phraseology of s. 13 of the Ballot Act, 1872, was not the same as that of s. 72 of the Municipal Corporations Act, 1882, and therefore the decision in *Marton* v. *Gorrill* (2), which was a decision under the Act of 1882, does not in any way affect the authority of *Gothard* v. *Clarke* (3), which was decided under s. 13 of the Ballot Act, 1872, and which is therefore directly in point.

HORRIDGE J. This is a petition to have it declared that the deputy returning officer of the rural district of Plympton St. Mary acted wrongly in rejecting the nomination papers of the four petitioners on an election for rural district councillors. The election is regulated by the Local Government Act, 1894, and the Rural District Councillors Election Order,

(1) L. R. 3 Q. B. 704, 711. (2) 23 Q. B. D. 139.
(3) 5 C. P. D. 253.

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1898, made in pursuance of that statute. The Local Government Act, 1894, provides by s. 20, sub-s. 5, that "the election shall, subject to the provisions of this Act, be conducted according to rules framed under this Act by the Local Government Board," and by s. 48, sub-s. 2, that "Rules framed under this Act by the Local Government Board in relation to elections shall, notwithstanding anything in any other Act, have effect as if enacted in this Act. . . . ." Therefore the rules which the Local Government Board made on January 1, 1898, are to have effect as if they were enacted in the Local Government Act, 1894. The rules we have to construe are rr. 4 and 33 of the Rural District Councillors Election Order, 1898. Rule 4 provides that "(1.) Each candidate for election as a rural district councillor shall be nominated in writing. (2.) The nomination paper shall state the name of the parish or other area for which the candidate is nominated, the surname and other name or names in full of the candidate, and his place of abode and description, and whether he is qualified as a parochial elector of some parish within the poor law union in which the rural district or the part of the rural district containing the parish or other area is comprised, or by having during the whole of the twelve months preceding the election resided in the union, or by being qualified to be a councillor for a borough wholly or partly situate within the union," and the rule goes on to provide that the nomination paper shall be in the form set out in the notice in the Form No. 1 in the Second Schedule to the Order, or in a form to the like effect. The Form No. 1 set out in the Second Schedule to the Order was the form which was followed in the present case. Column 5 of that form was headed: "How qualified (specify qualification according to direction in Instruction 5)." Instruction 5 repeats r. 4, which I have already read, requiring the name of the parish for which the candidate is qualified as a parochial elector to be inserted. If anything, the instruction makes the matter a little more clear than the rule, because it says "Insert in column 5 'Local Government elector of Parish of —'" leaving a blank for the insertion of the name of the parish.

What is complained of in the nomination papers of each of the four petitioners is that they do not say "Local Government elector for the parish of Plympton St. Mary," but merely say "Local Government elector." It seems to me that that was not a compliance with r. 4 of the Rural District Councillors Election Order, 1898, and that unless there is some Order or section of an Act of Parliament which gets over the difficulty the deputy returning officer was right in rejecting the nominations as being invalid. There are three sections which refer to this matter. In the first place the Ballot Act, 1872, provides by s. 13 that "no election shall be declared invalid by reason of a non-compliance with the rules contained in the First Schedule to this Act, or any mistake in the use of the forms in the Second Schedule to this Act, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in the body of this Act, and that such non-compliance or mistake did not affect the result of the election." Now that section has, by s. 48, sub-s. 3, of the Local Government Act, 1894, been made applicable at every election regulated by rules framed under that Act, and therefore would avail for the benefit of the petitioners in this case if the facts of the case brought it within the provisions of that section. But that section has been considered in *Gothard* v. *Clarke*. (1) In that case the returning officer had held that a nomination paper of a candidate at a municipal election for the office of town councillor was bad, because the number on the burgess roll of the person nominating the candidate was incorrectly stated in the nomination paper. It was sought to rely upon s. 13 of the Ballot Act, 1872, in order to get over that difficulty, but it was held by the Court that the defect in the nomination paper was not cured by s. 13 of the Ballot Act, 1872, as that section "was never intended to apply to any questions arising before the mayor, but refers to a time subsequent to a return by the mayor when the election is completed." It seems to me that that case is a decision that s. 13 of the Ballot Act, 1872, can only apply to a completed election—i.e., where

(1) 5 C. P. D. 253.

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a returning officer has wrongly accepted a nomination, and the election goes on and is completed. In my opinion that decision was right, because the words of the section obviously refer to an election which has taken place. The section speaks of an election not being declared invalid by reason of non-compliance with the rules, and also speaks of the tribunal having cognizance of the question, which clearly points to proceedings before an election tribunal upon a petition to have an election declared invalid. I therefore think it is clear that the section applies only to a case where there has been a wrongful admission of a nomination paper and not to a case where a nomination paper has been rejected.

We next come to s. 72 of the Municipal Corporations Act, 1882, which provides that "an election shall not be invalidated by non-compliance with the rules in the Third Schedule, or mistake in the use of the forms in the Eighth Schedule, if it appears to the Court having cognizance of the question that the election was conducted in accordance with the principles laid down in the body of this Act." It was not contended by Mr. Pratt that that section has any application to the present case, because it was not made applicable by s. 48, sub-s. 3, of the Local Government Act, 1894, to elections regulated by rules framed under that Act, but it was said that the judgment of Mathew J. in *Marton* v. *Gorrill* (1) shows that the Court in that case took a different view to that which was taken by the Court in the earlier case of *Gothard* v. *Clarke* (2), and that they did not limit the word "election," as used in s. 72 of the Act of 1882, to a "completed election," but held that under that section they were entitled to remedy a mistake of the returning officer before the actual election. Now to my mind it is quite clear that the two sections are quite different. Sect. 13 of the Act of 1872 says that "no election shall be declared invalid," which clearly refers to an election when it comes before an election judge upon a petition to have the election declared invalid; whereas s. 72 of the Act of 1882 provides that "an election shall not be invalidated," and furthermore the words in the latter part of s. 13 of the

(1) 23 Q. B. D. 139. (2) 5 C. P. D. 253.

Act of 1872 are not included in s. 72 of the Act of 1882. As was pointed out by Mathew J. in *Marton* v. *Gorrill* (1), the phraseology of the two sections is not the same, s. 13 of the Ballot Act, 1872, containing a provision which has been omitted from s. 72 of the Act of 1882.

The matter therefore comes to this, that according to the decision in *Gothard* v. *Clarke* (2), s. 13 of the Ballot Act, 1872, has no application in a case where a nomination paper has been rejected. Sect. 72 of the Municipal Corporations Act, 1882, does not apply to this case, and the decision of the Court in *Marton* v. *Gorrill* (1), which was decided upon that section, does not in any way impair the authority of *Gothard* v. *Clarke*. (2) We are therefore thrown back upon r. 33 of the Rural District Councillors Election Order, 1898, and the question is whether that rule enables us to say that although these nomination papers contained an omission which would otherwise be fatal, nevertheless it may be disregarded by reason of that rule, which says that "no misnomer or inaccurate description of any person or place named in any notice or nomination paper under this Order shall hinder the full operation of such notice or paper with respect to that person or place, provided the description of that person or place is such as to be commonly understood." It has not been contended before us by Mr. Pratt that the omission to state the name of the parish for which the person nominated was qualified as a local government elector is a misnomer, but it is said that it is an inaccurate description of the person nominated; it describes the person nominated accurately as far as it goes, but does not go far enough, because it does not give all the particulars required, and therefore is not an accurate description of him. I do not think that the statement of "Local Government elector" is a mere inaccurate description of the person nominated. In my view the omission to state the name of the parish for which the person nominated is qualified as a local government elector is a non-compliance with the requirements of r. 4 of the Local Government Board's Order of 1898, and that defect is not cured by r. 33. If authority

(1) 23 Q. B. D. 139. (2) 5 C. P. D. 253.

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be wanted, I think that *Reg.* v. *Tugwell* (1) is an authority for the proposition that where there is an omission of a "description" required by a statute or statutory Order that omission is not merely an inaccurate description of the person or place, but is a failure to comply with one of the requirements of the particular Order in question, and that defect cannot be cured. I therefore think that the deputy returning officer was right in rejecting this nomination paper, and the question in the special case must be answered in the affirmative.

SWIFT J. I agree, and I have nothing to add to what Horridge J. has said, except this. In the course of his argument Mr. Pratt referred to this omission to state the parish of which the person nominated is a local government elector as being a mere technicality. I do not agree. A statement of these particulars is required by the Local Government Board's Order, and I cannot think that the omission to state those particulars on a nomination paper is a mere technicality, because unless the parish, for which the person nominated is qualified as a local government elector, is named no one could test whether or not he is qualified. I agree that the deputy returning officer was right in rejecting these nomination papers.

Petition dismissed.

Solicitors for petitioners: *Law & Worssam.*

Solicitors for respondent Leatherby: *McIntyre, Emsley & Co.*

(1) L. R. 3 Q. B. 704, 711.

R. F. S.

KNEESHAW (Inspector of Taxes) *v.* CLAY AND HORSFALL.

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Oct. 24;
Nov. 2.

Revenue—Income Tax—Change in Partnership—Falling Short of Profits and Gains of Trade "since such change"—Mode of ascertaining falling Short—Method of computing Tax—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Rules applicable to Cases I. and II., r.* 11.

Rule 11 of the Rules applicable to Cases I. and II. of Sch. D of the Income Tax Act, 1918 (1), provides: "If within the year of assessment or the period of average upon which the assessment is to be based a change occurs in a partnership of persons engaged in any trade or profession . . . . the tax payable in respect of the partnership . . . . shall be computed according to the profits or gains of the trade or profession during the respective periods prescribed by this Act, notwithstanding the change . . . ., unless the partners . . . . prove to the satisfaction of the Commissioners that the profits or gains have fallen . . . . short from some specific cause, to be alleged by them, since such change . . . . took place, or by reason thereof":—

Held, that in order to establish that there has been a falling short of the profits or gains of a trade within the exception to r. 11, it has only to be shown that the profits or gains in the year of assessment have fallen short from some specific cause, and not that the aggregate profits or gains since the change have so fallen short; and if the profits or gains in the year of assessment are found to have fallen short from some specific cause, income tax is computed on the actual profits or gains of that year instead of on the average of the three preceding years.

Decision of Rowlatt J. reversed.

Owl Mill Co. (1920), v. *Croft* (1926) 11 Tax Cas. 56 overruled.

Joseph Fisher & Sons, Ld. v. *Dare* (1925) 9 Tax Cas. 292 not followed.

Miller v. *Farie* (1878) 6 R. 270 and the dictum of Lord Sands in *Stewart & Young* v. *Walker* (1926) 11 Tax Cas. 123, 132 approved.

The question what the profits or gains of the year of assessment should be compared with in order to ascertain whether there has been a "falling short" within the exception to the rule, was left undetermined by the majority of the Court, as on any view there was in the particular case a "falling short."

Per Lord Hanworth M.R. It is only necessary to show that the actual profits or gains of the year of assessment fall short from some specific cause of the amount at which tax would be computed if r. 11 applied.

Appeal from the decision of Rowlatt J. on a case stated by the Commissioners for the General Purposes of the Income Tax Acts for the division of West Morley.

(1) A new rule has been substituted by the Finance Act, 1926, s. 32; it came into force on April 6, 1928, and applies only to a change of partnership occurring after that date.

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KNEESHAW v. CLAY AND HORSFALL.

At a meeting of the Commissioners held on July 23, 1926, Messrs. Clay & Horsfall (hereinafter called "the firm") appealed against assessments to income tax for the years ended April 5, 1921, and April 5, 1922, in the sums of 39,302*l.*, less 1786*l.* wear and tear, and 35,285*l.*, less 2040*l.* wear and tear respectively, in respect of their profits as worsted spinners. These assessments were made on the average of the profits for the three years ended on March 31 in the year immediately preceding each of those years respectively, March 31 being the date to which their accounts were annually made up.

Prior to March 31, 1919, the partners in the firm were Messrs. F. Clay, J. C. Horsfall, F. B. Clay and S. Clay. The said J. C. Horsfall retired from the firm on March 31, 1919, and since that date the firm had consisted of Messrs. F. Clay, F. B. Clay, S. Clay and J. R. Clay.

Rule 11 of the Rules applicable to Cases I. and II. of Sch. D enacts that: "If within the year of assessment or the period of average upon which the assessment is to be based a change occurs in a partnership of persons engaged in any trade or profession, by reason of death, or of dissolution of the partnership as to all or any of the partners, or by the admission of a new partner, or if any person succeeds to a trade or profession, the tax payable in respect of the partnership, or any of the partners, or of the person so succeeding shall be computed according to the profits or gains of the trade or profession during the respective periods prescribed by this Act, notwithstanding the change or succession, unless the partners or the person succeeding to the trade or profession prove to the satisfaction of the Commissioners that the profits or gains have fallen or will fall short from some specific cause, to be alleged by them, since such change or succession took place, or by reason thereof."

The firm claimed that the assessments for the years ended April 5, 1921, and April 5, 1922, should be reduced under the provisions of the last part of r. 11 to the actual profits of the years of assessments—namely, 3295*l.*, less 1786*l.* wear and

tear, and 16,038*l.*, less 2040*l.* wear and tear respectively, on the ground that the profits had fallen short from some specific cause since the change in the partnership had taken place or by reason thereof.

The profits of the firm (after deducting excess profits duty) during the material time had been for the years ending March 31, 1917–22, respectively, 15,449*l.*, less 685*l.* wear and tear; 15,348*l.*, less 643*l.* wear and tear; 29,103*l.*, less 638*l.* wear and tear; 73,456*l.*, less 724*l.* wear and tear; 3295*l.*, less 1786*l.* wear and tear; and 16,038*l.*, less 2040*l.* wear and tear. The profits thereof for the two years to April 1, 1919 (the date of the change in the partnership), amounted to 44,451*l.*, and for the three years to that date amounted to 59,900*l.* The profits since the change in the partnership for the two years from April 1, 1919, to March 31, 1921, amounted to 76,751*l.*, and for the three years from April 1, 1919, to March 31, 1922, amounted to 92,789*l.*

The assessments under Case I. of Sch. D for the periods subsequent to the change in the partnership have been for the year ending April 5, 1920, 19,967*l.*, less 724*l.* wear and tear; for the year ending April 5, 1921, 39,302*l.*, less 1786*l.* wear and tear; and for the year ending April 5, 1922, 35,285*l.*, less 2040*l.* wear and tear. The aggregate assessments therefore since the change in the partnership took place for the two years to April 5, 1921, amounted to 59,269*l.*, and for the three years to April 5, 1922, to 94,554*l.*

From the foregoing it will be seen that:—

(*a*) As regards the year ended April 5, 1921, the total aggregate profits of the two years after the succession—i.e., the two years ended April 5, 1921—76,751*l.*—exceeded the aggregate assessments—59,269*l.*—for that period and also exceeded the total aggregate profits—44,451*l.*—of the two years prior to the succession.

(*b*) As regards the year ended April 5, 1922, the total aggregate profits of the three years after the succession—i.e., the three years ended April 5, 1922—92,789*l.*—exceeded the total aggregate profits—59,900*l.*—of the three years prior to the succession.

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It was contended (inter alia) on behalf of the firm :—

(1.) That there was an unprecedented depression in the worsted industry during the years 1920–21 and 1921–22, and that this was of such a nature as to constitute a specific cause within the meaning of the rule.

(2.) That the profits for both years had fallen short within the meaning of the rule.

Reference was made to the decision of the Court of Appeal in *Elliott* v. *Duchess Mill, Ld.* (1), and to the decision of the High Court, Northern Ireland (King's Bench Division), in *Joseph Fisher & Sons, Ld.* v. *Dare.* (2)

(3.) That the decision in *Joseph Fisher & Sons, Ld.* v. *Dare* (2) was practically overruled by the decision of the Court of Appeal in *Elliott* v. *Duchess Mill, Ld.* (1)

Mr. F. B. Clay and Mr. T. J. Cunningham, chartered accountant of the firm of Armitage & Norton, gave evidence in support of the first contention.

It was contended (inter alia) on behalf of the Crown :—

(1.) That there was no evidence that there was a falling short of the profits within r. 11.

(2.) That the assessments were made to the correct amounts and should be confirmed.

The Commissioners decided that there was an abnormal and unprecedented depression in the worsted industry, and that that was a specific cause within the meaning of r. 11, and operated for both years 1920–21 and 1921–22. They decided further that the assessments for both years 1920–21 and 1921–22 should be reduced to the actual profits of the years of assessment—namely, for 1920–21, 3295*l.*, less 1786*l.* wear and tear ; for 1921–22, 16,038*l.*, less 2040*l.* wear and tear.

On appeal Rowlatt J. held (reversing the Commissioners' decision) that to determine whether the case was within the exception to r. 11 comparison must be made between the profits of the firm before the change in the partnership and those made afterwards ; and that the comparison must be of the aggregate profits since the change with the aggregate profits of a corresponding period before the change. This

(1) (1926) 11 Tax Cas. 56, 76. (2) 9 Tax Cas. 292.

comparison showed that there had been no fall in the profits and gains since the change of partnership.

The firm appealed.

R. M. Montgomery K.C. and *W. Allen* for the appellants. Under r. 11 of the Rules applicable to Cases I. and II. of Sch. D to the Income Tax Act, 1918, tax is chargeable after a change in a partnership just as if no change had occurred "unless the partners . . . prove to the satisfaction of the Commissioners that the profits or gains have fallen short from some specific cause, to be alleged to them, since such change or succession took place, or by reason thereof." To come within that exception the partners have only to prove that the profits or gains during the year of assessment have fallen short owing to some specific cause. This is clearly so; and it is not open to argument in this Court that a slump in an industry is a specific cause having regard to this Court's decision in *Elliott* v. *Duchess Mill, Ld.* (1) In both the years in question here the profits have fallen short whether compared with a single year's profits before the change or the three years' average of the profits before then. The Crown's contention is, however, that the concluding words of r. 11 refer to a fall in the aggregate profits since the change, so that in the second or third years after the change it is not the profits of those years that have to be taken into account, but the aggregate profits to the respective ends of those years. If that were the correct view, no question of a fall in profits since the change would arise. But it is submitted that no such artificial rule of assessment would be proper. Tax is always paid on the profits of the year of assessment, although there may be some artificial mode for ascertaining those profits for the purposes of the Income Tax Act, 1918. But to compare longer periods would be contrary to the whole scheme of the Act. A possible construction of r. 11 is that it is the specific cause that is to have occurred "since such change . . . . or by reason thereof." In *Miller* v. *Farie* (2), a case under r. 4 to Cases I. and II. of the Income Tax Act, 1842,

(1) 11 Tax Cas. 56, 76.

(2) 6 R. 270, 276.

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which is substantially re-enacted in r. 11, comparison is made between the earnings of the year of assessment and the average over three preceding years to ascertain whether the profits had fallen short: see also *Stewart & Young* v. *Walker*. (1) In *Joseph Fisher & Sons, Ld.* v. *Dare* (2) the Court for Northern Ireland formed a contrary opinion, and took into account the earnings since the change; and in *Owl Mill Co.* (1920) v. *Croft* (3) Rowlatt J. followed the Irish case. It is contended that *Miller* v. *Farie* (4) was right, and this view receives support from *Yuanmi Gold Mines, Ld.* v. *Eborall* (5), where a similar question arose under a different section. The fact that the old rule was repealed in r. 11 after it had been construed in *Miller* v. *Farie* (4) indicates that this construction was accepted as correct.

[LORD HANWORTH M.R. That argument does not hold good when the re-enactment is in a mere consolidating statute.]

In any case it is the reasonable construction, having regard to the whole scheme of the Income Tax Act.

Sir Boyd Merriman S.-G. and *R. P. Hills* for the respondent. It is not sought to argue in this Court that the slump in the worsted trade was not a "specific cause," but the Crown reserve the right to argue it should there be an appeal to the House of Lords. The whole question of construction turns on the meaning of the expression, "the profits and gains have fallen . . . . short since such change." It is only possible to determine whether there has been a fall by comparing post-change profits and gains with pre-change profits and gains; and to determine whether there has been a fall "since such change," aggregate profits since the change must be compared with aggregate profits of a like period before the change. To take into account profits of the second or third year of assessment after the change only is to give the words "since such change" less than their full meaning. That was the view adopted by Rowlatt J. in *Owl Mill Co.* (1920) v. *Croft* (3) and the present case. In *Stewart & Young* v. *Walker* (1) the

(1) 11 Tax Cas. 123, 132.
(2) 9 Tax Cas. 292.
(3) 11 Tax Cas. 56.
(4) 6 R. 270, 276.
(5) [1921] 2 K. B. 544.

point never arose, and was only mentioned obiter by Lord Sands. Further, the question whether the profits of the second year after the change could be considered alone, omitting those of the first year, never arose in *Miller* v. *Farie*. (1) The only points argued in that case were (*a*) whether there had been a change in the law as regards the average period to be taken into account in assessing the tax; (*b*) whether certain depreciations could be taken into account; and (*c*) whether a slump in a trade constituted a "specific cause." The real importance of that case is that it decided that the specific cause could occur before or after the change; and it is fatal to the argument that the exception should be construed as meaning that the specific cause must be "since such change."

[GREER L.J. If the aggregate period after the change is to be taken into account, the anomaly would arise that if the first year showed a falling off in profits, relief could be obtained, while if the first year was a good one and the second year disastrous, no relief might be obtainable.]

It would not be fair to take the second or third year by itself and so obtain relief when there had in fact been no falling off in aggregate profits since the change. All the authorities are really in favour of the Crown's contention.

Montgomery K.C. in reply. Income tax is always paid in reference to the period of a year and it would be against the whole idea of that Act to compare actual profits for a broken period with earlier profits. In r. 11 "since" really means "after." This appeal is in substance an appeal from *Owl Mill Co.* (1920) v. *Croft*. (2) The only sound construction of the exception to r. 11 is to treat "profits and gains" as meaning "profits and gains of the year of assessment."

Cur. adv. vult.

Nov. 2. LORD HANWORTH M.R. This case raises a difficult question depending upon the proper construction to be placed upon r. 11 of the Rules applicable to Cases I. and II. of Sch. D.

The facts are simple. A business of worsted spinners was being carried on before March 31, 1919, by four partners.

(1) 6 R. 270. (2) 11 Tax Cas. 56.

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The accounts of the business were annually made up on March 31. At the date above mentioned a change was made in the partnership. One partner went out and another was taken in, but subject to this change of personnel the same business of worsted spinners was continued. The assessments questioned by the taxpayers are those for the years 1920–21 and 1921–22, that is to say, for the second and third years after the change in the partnership. The new firm contend that in these two years of assessment there was an abnormal and unprecedented depression in the worsted industry, and that that constituted a "specific cause" within the meaning of r. 11. The Commissioners accepted this contention, and have reduced the assessments upon the partnership in each of these two years to the figures of the actual profits made by the firm, with the corresponding allowances due to them for wear and tear. Rowlatt J. reversed this decision, and the firm appeal. He accepted the contention of the Crown that before the relief given by the rule can be obtained you must make a comparison between the profits made by the firm before the change in the partnership and those made by the firm afterwards, and the comparison is not to be of a single year's trading, but rather of pre-succession profits with post-succession profits taken broadly, not necessarily according to a three years' average or any particular assessment. With no little hesitation and doubt upon the difficulties involved I am unable to accept this view.

It appears to me necessary to go back a little before considering r. 11. Tax under Sch. D is to be charged in respect of the annual profits or gains arising or accruing to any person whether residing in the United Kingdom or not, from any trade exercised within the United Kingdom. Tax under Sch. D is imposed under Case I. "in respect of any trade not contained in any other Schedule"; and by the rule that applies to Case I. "the tax shall extend to every trade carried on in the United Kingdom," and is to be computed "on the full amount of the balance of the profits or gains upon a fair and just average of three years . . . . immediately preceding the year of assessment." Let it be noted that it

is the trade exercised in the United Kingdom that is taxed—upon its profits and gains—and that it matters not whether the person to whom the profits or gains accrue is, or is not, resident in the United Kingdom. It is the trade, not the personnel, that is important primarily, and the tax is to be computed on the system of the three years' average. Sch. D also provides the system on which the tax upon other trading is to be imposed. For example, mines are to be taxed on a five years' average "according to the Rules applicable to Schedule D so far as the same are consistent with the rules of this number": see Sch. A, No. III., r. 8. The rule of average over a period of years may apply well enough to businesses that have a series of annual profits behind the year of assessment, but provision must be made: (1.) for those that were set up within three years of the year of assessment; (2.) for the discontinuance of a trade; (3.) for those which are not in the same hands during the average period or the year of assessment; and (4.) for the intervention of a "specific cause" which disturbs the fairness of the average and makes some adjustment necessary. Such adjustments were originally given under the Act of 1842, and, on varying terms, have been allowed ever since. For the first of these contingencies provision is made by r. 1, sub-r. 2, of the rules applicable to Cases I. and II. For the second, discontinuance is dealt with by r. 8, sub-r. 2, of the same series of rules; and both r. 8, sub-r. 1, and r. 8, sub-r. 2, allow for an adjustment to be made if the actual profits fall short of the computation of profits and gains referred to in or made under them. But it is to be noted that these two rules, while providing for adjustments when a basis of actual profits would have been, or be, more favourable to the taxpayer, do not deal with any adjustment founded upon a "specific cause." Thirdly, where a trade changes hands and passes to a successor provision is made under r. 9 for an adjustment between the earlier owner and his successor. But there may be cases where there is no complete change and succession, but only such as arises from a change in the partners forming a partnership, which is still engaged in carrying on the same trade.

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The mode in which a partnership is to be charged is laid down in r. 10; and r. 11 deals with changes arising from the dissolution of partnership and the admission of a new partner or partners, or from a death and the succession thereupon arising. The rule provides that the profits or gains of the trade shall be computed "during the respective periods prescribed by this Act, notwithstanding the change or succession." The continuity of the trade, although in changed, or partially changed, hands, is recognized, and the computation of the tax is not to be altered or varied. It is the same trade, though in different hands. If the trade were a new trade and had been set up and commenced within the three years, then the computation would be made in the manner specified by r. 8 of the Rules applicable to Cases I. and II. But the rule under consideration is dealing with a change of persons, not with a new trade. I agree with Rowlatt J. that the rule treats the firm as continuous, because the trade is continuous, and "you are to calculate the average disregarding the fact that there has been a change or succession."

If the rule had stopped as above its direction would have negatived any adjustment, unless it was a business set up within three years, so as to fall within r. 8, sub-r. 1, and as between outgoing and incoming partners, it may be that r. 9, sub-r. 1, could be made to apply. That may or may not be. But it remains clear that in a case of a change of partners or succession, the computation of profits or gains, under r. 11, and during the respective periods prescribed by the Act, would have stood rigid. Then comes what I read as a proviso, and not as a condition, which, if complied with, makes the whole rule inapplicable. It appears to me that a proviso was required in order to bring in the rights in respect of "any other specific cause," which are given to all persons charged under Sch. D by r. 3 of the Miscellaneous Rules applicable to Sch. D.

I adhere to the opinion I expressed in *Elliott* v. *Duchess Mill, Ld.* (1), that a specific cause may be proved, whether occurring before or after the change or succession. But then

(1) 11 Tax Cas. 76.

comes the question, what is the standard from which "the profits or gains have fallen or will fall short"? It appears to me that the rule first lays down that standard—namely, tax is to be computed according to the profits of the trade during the usual periods of average prescribed by the Act—and that standard holds good, in spite of a change of partners or a succession. But not less in such cases of change of partnership or succession than in others, if proof is given of a loss due to a specific cause then the rigidity of the rule is gone, and the usual procedure laid down in s. 23 operates, and the amount of the assessment as reduced is to be deemed to be the "income from that source . . . . for that year." I cannot find any authority for taking any pre-succession or pre-change years, and contrasting them with post-succession or post-change years. The specific cause and its effect must be proved in each year of assessment. There seems no justification for taking any series of years before or after the change or succession. No such distinction is adverted to in the Act. Attention must be paid to each year and the falling short in that year. If the interpretation suggested by the Crown were accepted, it seems to me that the purpose of the section would be misconstrued. I find myself in agreement with the dictum of Lord Sands in *Stewart & Young* v. *Walker* (1), and with the Court in *Miller* v. *Farie*. (2)

In the result, upon the figures before the Court, I think the Commissioners, who had held that a specific cause had intervened in each year and reduced the profits, were right, and therefore the appeal succeeds, and must be allowed with costs.

GREER L.J. The appellants, a firm consisting of four partners carrying on business as worsted spinners, earned during the year ending March 31, 1921, a net profit of 1509*l*., and during the year ending March 31, 1922, a net profit of 13,998*l*. They were assessed for income tax for the year ending April 5, 1921, on an income of 37,516*l*., and for the year ending April 5, 1922, on an income of 33,245*l*. These

(1) 11 Tax Cas. 132. (2) 6 R. 270.

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assessments were computed on the average of the three previous years, and if it was right to make the assessments on this basis the figures could not be disputed. They appealed to the General Commissioners on the ground that as there had been a change in the constitution of the firm by the retirement of one partner and the introduction of another, they were entitled by r. 11, applicable to Cases I. and II. of Sch. D to the Income Tax Act, 1918, to have their assessments for the years in question reduced to the amount of their actual profits. The Commissioners allowed their appeal, and reduced their assessments accordingly. On appeal by case to the King's Bench Division Rowlatt J. allowed the appeal of the Crown, holding that the assessments on the three years' average were correct. This is an appeal by the firm from the decision of Rowlatt J.

The question involved in the appeal depends on the true interpretation and application of r. 11. [His Lordship read r. 11.] The profits of the firm from the years ending March 31, 1917, to the year ending March 31, 1922, are stated in para. 5 of the case. I need not read them, because it is obvious from the profits as there stated that if an average be taken of the years following the succession with an average of the years before the succession there was no falling short. During the two years from March, 1920, to March, 1922, there occurred an unprecedented depression in the worsted trade, which reduced the profits of the firm to the figures mentioned in para. 5. If the two years subsequent to the change in the firm are taken in the aggregate and compared with any two years before the change, there was no falling short in the profits; and if the three years subsequent to the change are taken in the aggregate and compared with the three years before the change, there was again no falling short in the profits. But if the actual figures are taken for each year of assessment and compared either with the assessment or with any of the three previous years, it is quite clear that there was a marked falling short in the profits. Rowlatt J. has held that in applying the rule you must look at the actual profits of all the years for which the figures are available,

and compare them with the actual figures of a similar period before the change in order to determine whether the profits have "fallen short" within the meaning of the rule. I find great difficulty in agreeing to this interpretation of the rule.

Income tax is an annual tax on the income of specified years. Under Sch. A the income taxed is the annual value of the property during the year of tax. The same is true of income from investments. The same is, in my judgment, true of income from profits. From the nature of these profits, which have to be included in a return made by the taxpayer during the year of tax, it is impossible to do anything else than estimate or "compute" the amount of such profits. But provision is made by s. 34 for the case where it turns out that by reason of losses the computation does not represent the true position of the year of tax, for the grant of relief and repayment to the taxpayer. It seems to me that when r. 11 speaks of the profits or gains falling short from some specific cause, it must mean the profits or gains of the year of tax in respect of which relief is being claimed. It does not say the profits or gains of the firm or taxpayer for the time since the change. The first part of the rule is clearly dealing with the computation ascertained by average for a particular year, which is to be made unless a specific cause has operated to make the profits or gains fall short. I cannot read the exception clause in the rule beginning with the word "unless" as referring to anything but the actual profits and gains of the year in respect of which the claim to relief is made. On the admitted figures I think the Commissioners were bound to hold, as they did, that the "gains or profits" for the year ending April 5, 1921, had "fallen short" within the meaning of the rule, and also that the profits or gains for the year ending April 5, 1922, had so "fallen short." It is not easy to determine whether the words mean short of the amount computed on the average of the three years, or whether they mean short of what they were before the change. But in either case it is clear that if we look at the actual figures of the years in question they fall short on either view.

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The view as to the meaning of the rule that commended itself to Rowlatt J. leads to the extraordinary result that the extent of the relief provided for by the rule will depend on whether the specific cause produces the falling off in the first year or in subsequent years. If the claim was made in respect of the first year and dealt with before the figures of the second year were available, the Commissioners would be bound to have regard to the year of tax only ; if it occurred in the second year they could look at the two years. The taxpayer might then get relief with regard to the first year, which he could not get if the specific cause did not operate till the second year. It seems to me, though the point is a difficult one, that the subtractor in the subtraction sum the Commissioners have to solve is the actual profit for the year in respect of which the claim to relief is made.

The point is not free from authority. In addition to his decision in the present case, there is an earlier decision of Rowlatt J. in substance to the same effect as the one in the present case: *Owl Mill Co.* (1920) v. *Croft.* (1) There is also a decision of the Court of Northern Ireland to the same effect: *Joseph Fisher & Sons, Ld.* v. *Dare.* (2) On the other side, and in support of the views above expressed, two Scotch cases were cited: *Miller* v. *Farie* (3), a decision which had relation to the first post-succession year, and the clear dictum of Lord Sands in *Stewart & Young* v. *Walker.* (4)

It was not contended before us that if the Commissioners were right in their construction of the rule the result would not be that the firm ought to be assessed on their actual profits for the years in question, though this seems to have been so contended in the Court below. I take it as conceded, and I think rightly conceded, that if the case is brought within the " unless " clause the appellants are entitled to be taxed on the actual profits of the two years in question.

For these reasons I am of opinion that this appeal should be allowed, and the decision of the Commissioners restored, with costs here and below.

(1) 11 Tax Cas. 56.
(2) 9 Tax Cas. 292.
(3) 6 R. 270.
(4) 11 Tax Cas. 123, 132.

RUSSELL L.J. The point to be decided is, whether the old r. 11 of the Rules applicable to Cases I. and II. under Sch. D in the Income Tax Act, 1918, applies to the two assessments here in question; that is, whether, notwithstanding the change in partnership which occurred, the tax payable shall be computed according to the profits or gains of the trade during the respective periods prescribed by the Act. The tax payable will be so computed unless the partners prove to the satisfaction of the Commissioners that (to quote the words relevant to the present case) "the profits or gains have fallen . . . . short since such change." There is no question in this Court as to the existence of a specific cause. The contest before us was confined to the meaning of the words above quoted. It is common ground that in order to ascertain whether a falling short has occurred, some profits or gains earned since the change must be compared with, and found to be less than, some standard. Further, it is common ground that in the present case it is immaterial what this latter standard should be; because if the subject's contention on the first point is correct a falling short has occurred, no matter which of the various suggested standards of comparison is adopted; and if the Crown's contention on the first point is correct no falling short can be established on any footing.

The question for decision accordingly is, what are the profits or gains which must be proved to have fallen short since the change? The Crown says all the profits and gains earned since the change—that is to say, that for the purpose of seeing whether r. 11 applies to the assessment of the appellants for the year 1920–21 you must take the total profits earned since the change on March 31, 1919, down to March 31, 1921, and compare them with the proper standard. The appellants on the other hand contend that the Income Tax Act throughout deals with the taxation of income of a year or in respect of a year, and that accordingly the proper and natural meaning of "the profits or gains" is the profits or gains earned during the year of assessment. They point out that the Crown's construction produces the curious result that if in the present case the figures of the profits for the

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Russell L.J.

respective years 1919–20 and 1921–22 had been reversed, the firm would, in respect of the first two years, have enjoyed the benefit of escaping from the operation of r. 11; whereas, although the total profits earned in the three years is unchanged, the accident that the good year came first prevents them from enjoying any such benefit.

Upon the whole I think the appellants' construction is correct. It accords with the scheme of an Act the purpose of which is taxation of income in respect of a year; and I do not appreciate (if all profits earned since the change are to be included) what limit of time is to apply in the case of a person seeking under the rule to prove, not an existing shortness, but a falling short in the future. This view accords with the language used by the Lord President in *Miller* v. *Farie* (1), and by Lord Sands in *Stewart & Young* v. *Walker*. (2) It is contrary to the decision of Rowlatt J. in *Owl Mill Co.* (1920) v. *Croft* (3), where he merely followed the case of *Joseph Fisher & Sons, Ld.* v. *Dare* (4), in which the King's Bench Division of Northern Ireland, without giving any reasons, affirmed a decision of the Commissioners arrived at after consideration of the aggregate profits for three and a half years after a succession. In these circumstances I feel myself unembarrassed by any previous decision, and quite free to give effect to what I believe to be the meaning of the words used in the rule.

I agree that the appeal succeeds.

Solicitors: *Jaques & Co., for Godfrey, Rhodes & Evans, Halifax; Solicitor of Inland Revenue.*

(1) 6 R. 270, 276.
(2) 11 Tax Cas. 132.
(3) 11 Tax Cas. 56, 69, 70.
(4) 9 Tax Cas. 292.

H. C. G.

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[1928. B. 601.]

Defamation — Libel — Defence of fair Comment — Particulars — Colourable Justification.

Where the defendant in an action for libel pleads that the words complained of are fair comment, made in good faith and without malice, on matters of public interest, he is entitled to give particulars of the facts upon which he based his comments, although those facts are defamatory of the plaintiff and there is no plea of justification.

APPEAL from an order of Horridge J. striking out particulars of the defence.

The plaintiff, who claimed damages for libel, was at all material times chairman of the Isle of Wight Waterworks Company, and the defendant Board was at all material times the chairman of the Sandown Urban District Council and a member of the water committee of that council. The Isle of Wight Waterworks Company was incorporated by the Isle of Wight Waterworks Act, 1861 (24 & 25 Vict. c. lv.), for the purpose of supplying water to, among other places, Sandown. By s. 71 of the Isle of Wight Water Act, 1927 (17 & 18 Geo. 5, c. lxxv.), it was provided that if the Sandown Urban District Council should introduce in the next session of Parliament a Bill to empower them to purchase the company's undertaking, the company would not oppose the Bill except in so far as in the section provided. The defendant Board who, the plaintiff alleged, was desirous that the council should promote the necessary Bill to obtain power to purchase the company's undertaking, published in an Isle of Wight newspaper a series of letters which, the plaintiff alleged, meant and were intended and understood to mean that the plaintiff, in opposing the wishes of the defendant Board and/or the water committee of the council to proceed with the terms of the Bill, was actuated by dishonest and selfish motives; that he made deliberate misstatements and scurrilous attacks on the reputation of honourable men whose opinions did not correspond with his own; that he was endeavouring to hoodwink the inhabitants of Sandown and

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in particular the municipal electors who had to vote on the question by making promises which he knew to be worthless and which he did not intend to keep; and that he was corrupt, unscrupulous and dishonourable.

The defendant admitted the publication of the words complained of, but said that they did not mean and were not understood to mean what the plaintiff alleged; that the publication of the words was made bona fide and without malice, and upon privileged occasions; and, further, that the words were fair comments made in good faith and without malice upon a matter of public interest. The defendant gave particulars setting out the facts upon which he was commenting. In those particulars the defendant said that the plaintiff had written a number of letters to the same newspaper as that in which the letters complained of by the plaintiff had appeared, that in his letters the plaintiff had made misleading statements as to the Sandown Urban District Council's experience in municipal trading; that if that council purchased the waterworks they would be compelled by the Ministry of Health to purchase a certain large area of land—a statement which the defendant considered misleading; that the plaintiff had stated incorrectly the cost of pumping the water; that the plaintiff had in the course of his letters (which were specified) attacked the defendant and members of the Sandown Urban District Council and others. The defendant did not plead justification.

Upon an application by the plaintiff, Horridge J. struck out a number of those particulars as tending to prejudice, embarrass or delay the fair trial of the action in that they were defamatory of the plaintiff, were in fact a colourable justification of the sting of the libel, and were improperly introduced under the guise of facts upon which the comments were based.

The defendant appealed.

du Parcq K.C. and *Blake Odgers* for the appellant. The appellant's pleading has been attacked on the ground that it is said to be a colourable attempt to set up justification

without putting a plea of justification upon the record. Where a defendant pleads justification he undertakes to prove to the satisfaction of the jury the truth of every imputation conveyed by the words in their natural meaning. In a plea of fair comment the defendant undertakes to satisfy the jury that certain facts upon which his comments are based are true, but he is not required to justify the imputations conveyed by his comments. Where a defendant pleads the "rolled-up plea"—and that is a plea of fair comment only: *Sutherland* v. *Stopes* (1)—the Court cannot order him to give particulars of the facts upon which he relies as the basis of his comments: *Aga Khan* v. *Times Publishing Co.* (2); but the position is different where, as in this case, the appellant has not pleaded the rolled-up plea, but has pleaded fair comment on a matter of public interest in the wider form. In such a case he is bound, or at any rate is entitled, to set out, as he has done, the materials upon which he has based his comments: see per Collins M.R. in *Digby* v. *Financial News*. (3) Horridge J. was therefore wrong in striking out the appellant's particulars.

[They also cited *Lyons* v. *Financial News*. (4)]

Rayner Goddard K.C. and *Wilfrid Lewis* for the respondent. This attempt to justify statements defamatory of the respondent under a plea of fair comment is not permissible in the absence of a plea of justification. The law is correctly stated thus in Fraser's Law of Libel and Slander, 6th ed., p. 409: "It must be remembered that in view of the observations in *Sutherland* v. *Stopes* (1) .... if, where particulars are ordered, a defendant seeks to include in his particulars of the facts commented upon matters clearly defamatory of the plaintiff, the latter can apply for, and should obtain, an order that such allegations be struck out on the ground that they constitute an attempt to set up a defence of justification." The language of Collins M.R. in *Digby* v. *Financial News* (5) is exactly in point: "The only defence

(1) [1925] A. C. 47.
(2) [1924] 1 K. B. 675.
(3) [1907] 1 K. B. 502, 507–8.
(4) (1909) 53 Sol. J. 671.
(5) [1907] 1 K. B. 502, 509.

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on the pleadings is one of fair comment, and if it should become necessary for the defendants to rely upon the truth of statements which the jury find to be injurious to the plaintiff, the defendants could not possibly succeed in the absence of a plea of justification." That is still the law and justified the striking out of the particulars given by the appellant.

SCRUTTON L.J. This is a troublesome case, like all others involving the question of fair comment, and I propose to say as little as possible about the facts, as they may have to be investigated later by a jury.

I understand the position to be this: the question whether the Sandown local authority should buy the local water company's undertaking was exciting considerable public interest. Judging by the extracts from the letters which are set out in the pleadings, each of the leading partisans expressed his opinion of the other in very uncomplimentary terms, and one of them has been ill-advised enough to go to law about it. The plaintiff, who has written a number of letters strongly reflecting on the defendant, brings his action in respect of letters written by the defendant which the plaintiff says strongly reflect upon him. The defendant does not justify in the sense of saying that the statements he has made are true and the inferences which people would draw from them are correct; what he says is that the words used are fair comments, made in good faith and without malice, upon a matter of public interest. It is the law that if a defendant can show that there is a matter of public interest and that his comments, so far as they are based upon facts, are based upon real, true, existing facts, and the comments are fair, not in the sense that they must be made, but are such that a reasonable man might make although another man might reasonably take a different view, they are protected. Here the pleader has pleaded fair comment and stated the particulars of the facts—letters written by the plaintiff to the newspaper—upon which the defendant based his comments, which he says are fair. The plaintiff applied to strike out a number of these particulars on the ground that the defendant

is not entitled to include them in his pleading unless he justifies them, that is, says that they are true. There are two senses in which a defendant may justify or say that statements are true: he may justify the words with the inferences that would ordinarily be drawn from them, and say that they are correct. That is the ordinary plea of justification. There is a more limited sense in which he may justify: he may say that the facts stated are facts, and that the inferences drawn from them and the comments made on them are opinion, and that the inferences and comments are fair in the sense that they were made without malice and were such as might reasonably be made on the facts. The question is, can the defendant put forward the latter defence without putting on the record a plea of justification in the ordinary sense? In my opinion he can. The latest authority on the question of justification and fair comment is *Sutherland* v. *Stopes* (1) where I find in the speeches of the law lords the distinction drawn which I have endeavoured to state. Lord Finlay, referring to the plea, called the rolled-up plea, said (2): "There has been a good deal of misconception as to the nature of this plea. It has been sometimes treated as containing two separate defences rolled into one, but it in fact raises only one defence, that being the defence of fair comment on matters of public interest. The averment that the facts were truly stated is merely to lay the necessary basis for the defence on the ground of fair comment. This averment is quite different from a plea of justification of a libel on the ground of truth, under which the defendant has to prove not only that the facts are truly stated but also that any comments upon them are correct." Again, he said (3): "I read the summing up as a direction to the jury that in considering the justification they were to find whether the statements of facts in the libel were true, while as to any portion of the libel consisting of comment, they were to say whether it was fair comment. The jury found that the facts were correctly stated, but as regards the comment they

(1) [1925] A. C. 47. (2) [1925] A. C. 62.
(3) [1925] A. C. 65.

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Scrutton L.J.

found that it was not fair. It is therefore, in my judgment, impossible to deal with the case as if there had been a finding for the defendants upon the plea of justification in the ordinary way. The finding was merely that the facts had been proved." There is a similar statement in the speech of Lord Carson. If that is the position, what does the defendant in fact allege here? He alleges that the matters are fair comment on matters of public interest, and he sets out the facts on which he made his comments. Mr. Goddard, for the plaintiff, contends that the defendant cannot be allowed to set out and rely on those facts unless he adds a plea of justification. In my view, in alleging facts on which he relies he is asserting that these are facts, that he will prove them—not that he will justify them—and ask the jury to say that the comments are fair. From that point of view I think that the particulars should stand. They are simply an allegation of fact which the defendant proposes to prove, not an allegation that the facts and inferences which would necessarily be drawn from them are true. In these circumstances I think the appeal must be allowed, and the particulars reinstated.

LAWRENCE L.J. I agree and have nothing to add.

SANKEY L.J. I agree and only desire to add a few words. The plea is that the words are fair comment made in good faith and without malice upon a matter of public interest. Under a plea of that character the defendant is entitled to show, and indeed he must show, what the facts were upon which he commented, that they are facts, that the matter is one of public interest, that the comment is fair, and that the comment was made in good faith and without malice. That, I think, appears from the decision in *Sutherland* v. *Stopes* (1), especially in the passage from the speech of Lord Finlay (2) quoted by Scrutton L.J. For these reasons I think the appeal should be allowed.

Appeal allowed.

Solicitors for appellant: *Sharpe, Pritchard & Co.*

Solicitors for respondent: *Lawrance, Messer & Co.*

(1) [1925] A. C. 47. (2) [1925] A. C. 62.

J. S. H.

FARNHAM UNION *v.* CAMBRIDGE UNION.

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Nov. 5, 6.

Poor Law—Settlement—Residence in Parish for three Years—Residence under Contract—Departure from Parish before Expiry of Contract—No animus revertendi.

C., under a three years' contract with a nursing association, resided in the parish of F. A few weeks before the expiration of her contract she was granted a three weeks' holiday, and left F. not intending to return. The period of three years from the commencement of her residence in F. expired after she left F., but before the expiration of her contract:—

Held, nevertheless, that as on leaving she did not intend to return to F., her residence therein was broken.

CASE stated by the Recorder of Cambridge.

The appellants, the Farnham Union, appealed against an order of justices adjudging that the last legal place of settlement of Susannah Ada Cook (herein called "the pauper lunatic") was in the parish of Frimley in the above union. The Recorder affirmed the order, but stated this case.

The pauper lunatic on July 19, 1920, came to a nursing home belonging to the Camberley, Yorktown, Frimley and Ash Benefit Nursing Association (herein called "the association"), situate in the above parish of Frimley, for the purpose of being trained. On July 20, 1920, she entered into an agreement with the association, which contained the following provision (inter alia): "The association agrees that the nurse [i.e. the pauper lunatic] shall receive free of charge one year's training in general nursing and midwifery from July 20, 1920. During such training the nurse shall be paid by the association at the rate of 16*l.* per annum quarterly. The nurse will remain in the service of the association if required for not less than three years from the completion of the period for her general training. . . . ." Her training was to be at Derby. Accordingly, on the same day she went to Derby and remained there until June 18, 1921, her training being completed, when, with the consent of the association, she went on holiday. On July 9, 1921, at the conclusion of the holiday, she returned to Frimley, and on that date commenced the period of three years' service referred to in the agreement. In pursuance thereof she resided in the nurses' home in Frimley

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from that date until July 2, 1924. On that date she was allowed by the association to take a three weeks' holiday which was due to her, and her wages up to July 23 were paid her. She accordingly left Frimley on July 2. During the course of and before the termination of the holiday, namely on July 9, 1924, the period of three years commencing on July 9, 1921, expired. When she left Frimley on July 2 she did not intend to return, and in fact did not return. She eventually went to the parish of Cambridge in the respondent union, and on February 10, 1927, was removed thence under the order of a justice of the peace to the Cambridge County Lunatic Asylum as a pauper lunatic. On November 25, 1927, the above order adjudging the settlement was made.

At quarter sessions the appellants contended that the pauper lunatic did not reside in Frimley save as between July 9, 1921, and July 2, 1924, and accordingly was not settled therein. The respondents contended that she resided in Frimley for three years or more between July 19, 1920, and July 23, 1924.

The Recorder held (1.) that the pauper lunatic did not reside in Frimley from July 19, 1920, to July 9, 1921, but that (2.) she did reside therein from July 9, 1921, up to July 23, 1924, and had accordingly resided therein for three years within the meaning of the poor law statutes and was settled therein, but stated this case. A copy of his judgment accompanied and formed part of the case.

Sydney Davey for the appellants. The Recorder was not justified in finding that the pauper lunatic resided in Frimley after July 2. The test is whether, when she left on that date, she intended to return—*Reg.* v. *St. Leonard, Shoreditch* (1)—and it is admitted that she did not intend to return, and in fact never did return.

[*Reg.* v. *Stapleton* (2); *Reg.* v. *Brighthelmston* (3); *Reg.* v. *Manchester* (4); *Reg.* v. *Stourbridge Union* (5); and *Holborn Union* v. *Chertsey Union* (6) were also referred to.]

(1) (1865) L. R. 1 Q. B. 21, 23.
(2) (1853) 1 E. & B. 766.
(3) (1854) 4 E. & B. 236.
(4) (1857) 5 W. R. 751.
(5) (1865) 34 L. J. (M. C.) 179.
(6) (1885) 15 Q. B. D. 76.

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The Recorder was justified in finding that the pauper lunatic did not reside in Frimley from July 19, 1920, to July 9, 1921. She actually resided there for one day only, from July 19 to July 20, merely as a visitor, and then was absent for a year. Even assuming that she had the intention of returning at some future time, absence for a year was too long to render that absence temporary only: *Totnes Union* v. *Cardiff Union*. (1) In any case such intention was too indefinite and dependent on extraneous circumstances, for under her agreement she could be sent anywhere, and must have contemplated being sent to places other than Frimley.

Montgomery K.C. and *G. D. Pryor* for the respondents. The pauper lunatic resided in Frimley after July 2. It may be that she hoped and, as far as she could do, intended not to return; but her engagement did not terminate until July 23, i.e., after the expiration of the qualifying three years, and until that date she was bound to return if sent for and could not refuse without breaking her contract, and it is not to be presumed that she would have broken it. She might have had to return to receive her wages and consequently to sleep in the parish the night.

The residence in Frimley began on July 19, 1920, when the pauper lunatic first came there. She clearly intended to return there, and her absence in Derby was temporary only and for a temporary purpose, namely, the completion of her training, and her wages while there were paid by the association in Frimley. At any rate, the period from June 18 to July 9, 1921, when she was on holiday, ought to be counted as residence in Frimley. She had left Derby and would have gone straight to Frimley if not allowed to go on holiday.

[*Manchester Guardians* v. *Ormskirk Guardians* (2) and *Reg.* v. *Stepney Union* (3) were referred to.]

LORD HEWART C.J. This is a case stated by the Recorder of Cambridge. There was an appeal to quarter sessions by the Farnham Union against an order made on November 25, 1927, by two justices adjudging that the settlement of a pauper

(1) (1886) 51 J. P. 133. (2) (1886) 16 Q. B. D. 723.
(3) (1884) 54 L. J. (M. C.) 12.

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lunatic named Cook was in the Farnham Union. It is not necessary to repeat the facts set out in the case. The correctness of the order was challenged on the question whether the pauper lunatic had resided for the third of three years in the Farnham Union. The material dates are taken from correspondence between the pauper lunatic and the matron of the nursing home at Frimley in the Farnham Union. The pauper lunatic went to Frimley on July 19, 1920, for training as a nurse by the nursing association, and on the following day she was sent by the association to Derby for the purposes of that training, and she remained there until June 18, 1921. With the consent of the association she went on holiday from June 18 to July 9, 1921. On July 9 she returned to the nursing home in Frimley, and carried out her duties there until July 2, 1924. On July 2, 1924, with the permission of the association she left Frimley, as a three weeks' holiday was due to her, and wages up to July 23, 1924, were paid to her. She did not return to Frimley, but eventually went to the parish of Cambridge, whence, on February 10, 1927, she was removed to the Cambridge County Lunatic Asylum as a pauper lunatic.

Upon these facts the learned Recorder arrived at two conclusions: (1.) that for the purposes of settlement the pauper lunatic resided in Frimley in the appellant union for a term of three years from July 9, 1921, and (2.) that she did not reside in that parish from July 19, 1920, to July 9, 1921. The question for us is whether he was right in law in so holding.

To take the questions in the order stated, there is an important finding of fact to be added that is not contained in the case, but is to be found in the judgment of the learned Recorder which is made part of the case. It is in these words: "She then left . . . . and admittedly had no intention of returning." No doubt the reason why this finding appears in the judgment and not in the case is that it was common ground between the parties. The question therefore is whether for the purpose of settlement she did reside for three years in the parish of Frimley from July 9, 1921. The word "reside" has given rise to many questions, and it has been

pointed out that the word may have one meaning in one context and a different meaning in another—one meaning in relation to one purpose and another meaning in relation to some other purpose. Here its meaning is in relation to the law of pauper settlement, and there is a passage in the judgment of Hawkins J. in *Holborn Guardians* v. *Chertsey Guardians* (1) which deals with its meaning in that relation. "Mere bodily presence or actual dwelling in a parish, though prima facie, is not absolutely, sufficient to satisfy the statute; more is required. The residence must be such as to satisfy the tribunal before which the question arises, that the place of it was the home and fixed place of abode of the person whose settlement is disputed. If a person having a home of his own of which he is the head, or being a member of his father's family, and having his fixed home as of right or by permission at his father's house, quits it for a mere temporary purpose, intending on leaving and during all his absence to return to it so soon as the object of his absence is accomplished, and then to live in it as before—such mere temporary physical absence does not operate as a break in his residence at his father's home—though physically absent his residence continues. A man who goes from his home on a journey, or a visit, intending to return to it when his journey or his visit is over, though dwelling away from it for a time, cannot be said to be resident at the place where he is a mere visitor. On the other hand, if a person having a fixed home, whether as the head of it, or as being a member of a family, and whether emancipated or not, quits it with the intention not to return; or to return only upon the happening of some particular uncertain event, he cannot be said during his absence to reside in the home he has so quitted. Whether the animus revertendi existed is always a question not of law but of fact, to be determined by the justices, having regard to the circumstances of each particular case, though of course it is a question of law whether there is *any* evidence to justify the justices in their finding, or whether the findings justify the adjudication." In the present case if the question

(1) (1884) 14 Q. B. D. 289, 294.

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is asked: Did the pauper lunatic live in Frimley for three years from July 9, 1921? the answer is that as a matter of physical fact she did not. In these circumstances the burden is upon those who allege that if the facts are correctly understood she did so reside to show reasons why that proposition is true. As soon as one embarks upon that task one sees a finding of fact that not only did she not return but that she had no intention of returning after the date when she left. In these circumstances I think that the learned Recorder made an error in law in holding that the three years' residence was complete. Much has been said about the meaning of actual and constructive residence. It may well be that the word "constructive" is really superfluous if "residence" is correctly defined, and many authorities show that where there is not physical residence the ingredient of animus revertendi is crucial. It seems unfortunate that the learned Recorder was told that there was no case anything like this or worth citing, while before us some nine cases which have a bearing on the point have been cited. I come to the conclusion that the learned Recorder was wrong in holding that a residence for three years had been established.

The second question, namely, whether the pauper lunatic resided in Frimley from July 19, 1920, to July 9, 1921, is a question of fact, and not only was there evidence to support the finding of the learned Recorder, but I cannot see any evidence the other way, and he could not have found otherwise than he did find. The appeal, I think, should be allowed.

SWIFT J. I agree, and have nothing to add.

ACTON J. I agree.

Appeal allowed.

Solicitors for appellants: *Johnson, Weatherall, Sturt & Hardy, for Potter, Crundwell & Bridge, Farnham.*

Solicitors for respondents: *Sharpe, Pritchard & Co., for Whitehead, Todd & Barr, Cambridge.*

W. L. L. B.

Applied. R. *v.* PONTYPRIDD LICENSING JUSTICES. *Ex parte* ELY BREWERY CO., LTD. [1948] 2 All E.R. 581.

THE KING *v.* WATFORD LICENSING JUSTICES.

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Nov. 6, 7.

Ex parte TRUST HOUSES, LIMITED.

Licensing Law—Licensed Premises—Proposed Alterations—Consent of licensing Justices—Jurisdiction of Justices—Right to impose Condition—Closing of a Means of Access to Premises—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *and* 1 *Geo.* 5, *c.* 24), *ss.* 71, 72.

On an application under the Licensing (Consolidation) Act, 1910, s. 71, for the consent of the licensing justices to an alteration in licensed premises which would give increased facilities for drinking:—

Held, that the justices had jurisdiction to require, as a condition of the granting of the application, the closing of a gateway at the rear of the premises some distance from the part where intoxicating liquor was sold, and opening on the one side into the back yard of the premises and on the other side upon land where a public market-place was in course of construction.

Bushell v. *Hammond* [1904] 2 K. B. 563, observations held applicable.

ORDER NISI for a mandamus.

Trust Houses, Ld. (hereinafter called "the applicants"), were the owners of premises known as "The Essex Arms," Watford, part of which was fully licensed as a hotel and restaurant. The premises were situated on the north side of the High Street, Watford. The ground floor of the premises consisted on the west side of the bars and restaurant which adjoined the High Street, of kitchens and scullery to the north of the bars, and of outbuildings extending still further to the north; and on the east side of a large assembly hall called the Essex Hall, of various rooms connected with that hall at its north end, and of outbuildings further to the north; and between the bars on the west and the hall on the east there was a covered way which led from the High Street northwards into a large yard between the buildings to the north on either side. The first floor consisted on the west side of a lounge and coffee room above the bars and the southern part of the covered way, of a store and servery to the north of the lounge, of a masonic hall to the north of the servery with a lodge room at its north end, and of staff bedrooms along the west side of that hall; and on the east side, above

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the rooms to the north of the Essex Hall, of a staff room and staff bedrooms which communicated by a passage with the masonic hall. The main entrance to the hotel premises was from the High Street into the bars and restaurant. The assembly hall had never been included in the licensed part of the premises, a special licence being obtained when it was used for entertainments. At the north-eastern corner of the premises there was a gateway between the yard at the back of the premises and a piece of land lying to the east thereof.

The applicants were desirous of altering the premises by remodelling the bars upon the ground floor and giving a separate entrance to the restaurant and hotel premises proper; by turning the masonic hall on the first floor into a new coffee room; and by adding new bedrooms at the back of the premises. In order that these alterations might be made it was necessary to obtain the consent of the licensing justices under the Licensing (Consolidation) Act, 1910, s. 71. (1) On February 9, 1928, plans embodying the proposed alterations were lodged with the clerk to the justices. On February 12, 1928, some of the justices made an inspection of the premises and offered various criticisms and objections against the proposed extension of the licensed area, but no mention was then made of the gateway at the north-eastern corner of the premises. On February 28, 1928, the plans were formally presented to the justices at transfer sessions, but the justices were unwilling to approve them unless they were altered so as to embody certain suggestions of the justices as to the cutting off of the assembly rooms from the licensed premises; and the justices adjourned the application in order that the plans might be thus further amended. The applicants

(1) The Licensing (Consolidation) Act, 1910, provides: Sect. 71. "(1.) An alteration in any licensed premises in respect of which a justices' on-licence is in force, which gives increased facilities for drinking, or conceals from observation any part of the premises used for drinking, or which affects the communication between the part of the premises where intoxicating liquor is sold and any other part of the premises, or any street or other public way, shall not be made without the consent of the licensing justices given either at the general annual licensing meeting or at transfer sessions."

remodelled the plans accordingly, embodying therein substantially all the suggestions that had so far been made by the justices. On April 4, 1928, some of the justices again visited the premises, and on April 16, 1928, the clerk of the justices informed the secretary of the applicants that the justices were prepared to pass the plans as remodelled, provided that the gateway at the north-eastern corner of the premises was permanently bricked up, but the applicants would not agree to that being done. On May 12, 1928, the remodelled plans were lodged with the justices' clerk. On May 29, 1928, the applicants applied at transfer sessions to the justices in court to approve the plans as remodelled. The justices stated that they would pass the plans if the gateway were bricked up, but not otherwise, and as the applicants would not agree to that proposal the justices refused to approve the plans.

On June 18, 1928, the applicants applied for and obtained an order nisi calling upon the justices to show cause why a writ of mandamus should not issue directed to them commanding them to hear and determine the matter of the application of the applicants for the approval by the justices of plans relating to the proposed alterations of the licensed premises on the grounds that, in withholding their consent to the proposed alterations, the justices had acted capriciously and not according to law; that the justices had sought to impose upon the applicants a condition which was irrelevant and illegal and had refused to grant their consent except subject to that condition; that the justices had no power to impose upon the applicants a condition other than one calculated either to prevent an increase of facilities for drinking or to prevent concealment from observation of any part of the premises used for drinking, or which concerned any proposed alteration affecting the communication between the part of the premises where intoxicating liquor was sold and any other part of the premises or any street or other public way; and that the justices came to the hearing of the application with their minds made up, and did not hear and determine the application according

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to law. Notice of the order nisi was directed to be given and was given to the justices or some of them and to the superintendent of police.

The application was supported by an affidavit made by the secretary of the applicants on their behalf in which he mentioned the above mentioned facts, and alleged further that the gateway had no connection with any of the proposed alterations, that the alterations would not shorten the journey of a person coming through the gateway and going to the bars, and that therefore in respect of the gateway none of the alterations gave increased facilities for drinking; that nobody had suggested that the proposed alterations affected the communication between the part of the premises where intoxicating liquor was sold and any street or other public way, and that such of the alterations as affected the communication between the part of the premises where intoxicating liquor was sold and any other part of the premises were all remote from the gateway and entirely unconnected with it.

On July 18, 1928, the chairman of the justices made an affidavit in answer in which he stated that in 1918 the licensing justices visited the premises in question and saw the gateway at the north-eastern corner of the premises, which was then in a broken-down and dilapidated condition and had rubbish piled up against it, and it was obvious to the justices that it was not in use and had not been in use for some considerable time; that during 1927 the Watford Borough Council purchased the land immediately to the east of the premises for the purpose of constructing a public market-place on it, and that the market-place was then actually in course of construction; that at the inspection by the justices on February 12, 1928, there was a great deal to be gone through and they failed to observe the gateway; that on April 4, 1928, when the justices again visited the premises they noticed that the gateway was open and not blocked up; that at the hearing on May 29, 1928, the justices, taking into account all the circumstances of the case, came to the conclusion that unless the applicants would undertake to

again close up the gateway, it was not in the public interest that the application should be granted; that the justices refused the application being of opinion that it was undesirable that there should be direct communication from these premises into a public market, that there should be a way through licensed premises from the High Street to the public market which could and probably would be used by the public, and that if the proposed alterations and additions to the premises were carried out the difficulties of supervision both by the licensees and the police would be greatly increased; that the reason why the question of closing the gateway was not raised earlier by the justices was that it was not until April 4, 1928, that it was noticed that the gateway was open; that the plans ultimately placed before the justices for their approval involved the re-inclusion in the area used for the sale and consumption of intoxicating liquor of the taproom, which added area was much nearer to the gateway than to the High Street; and that the justices gave the proposals of the applicants every consideration and were prepared to hear and did hear counsel for the applicants fully on all points.

On July 26, 1928, the secretary of the applicants made an affidavit in reply to the last mentioned affidavit in which he said that the statement that the gateway was broken down and dilapidated and had rubbish piled against it was exaggerated and fanciful, and that since 1918 there was never a period when the gateway was not in use and a great convenience in connection with the hotel yard; that on July 16, 1928, the superintendent of police, on being asked whether the gateway was objectionable, made no suggestion that it was, although he indicated that it might be different in the future when the new market was held; and that at the hearing on May 29, 1928, none of the justices ever put forward any of the reasons mentioned in the affidavit of the chairman for refusing the application.

On November 6 and 7 the order nisi came before the Court for argument.

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Montgomery K.C. and *Sidney Lamb* showed cause.

R. Oliver K.C. and *Maurice Healy* in support of the order nisi.

In the course of the argument the following cases were cited: *Bushell* v. *Hammond* (1); *Rex* v. *Dodds* (2); and *Rex* v. *Shann.* (3)

LORD HEWART C.J. This is an order nisi for a writ of mandamus to the licensing justices of Watford commanding them to hear and determine the matter of an application by Trust Houses, Ld., for the approval by the justices of plans relating to proposed alterations in certain licensed premises in Watford. Four grounds are set out in the order nisi by those who seek that it should be made absolute, but they all involve the same question—namely, whether in considering an application under s. 71 of the Licensing (Consolidation) Act, 1910, for their consent to an alteration of a kind there mentioned in licensed premises the licensing justices are entitled to impose a condition requiring the closing of a means of access to the premises. Here the justices undoubtedly intended to make it a term of the granting of their consent that a gateway at the back of the premises should be closed.

It is said on behalf of the applicants that in seeking to impose that condition the justices travelled beyond the question before them into something extraneous and irrelevant, and therefore that the hearing and determination by them was not a hearing and determination of that question according to law. The very able argument of counsel in support of the order nisi depends upon a particular interpretation of s. 71, sub-s. 1, of the Act. [His Lordship read the sub-section and continued:] The argument is that the field, arena, or scope within which the minds of the licensing justices are permitted to work in dealing with an application under the sub-section is limited by the words which describe the nature of the alteration giving rise to the inquiry. It is asserted that the justices may ask themselves: "How far does the proposed alteration give increased facilities for drinking?," "How

(1) [1904] 2 K. B. 563. (2) [1905] 2 K. B. 40.
(3) [1910] 2 K. B. 418.

far does it conceal from observation any part of the premises used for drinking ?," or " How far does it affect the communication between the part of the premises where intoxicating liquor is sold and any other part of the premises or any street or other public way ? " ; but that once the justices go beyond these particular and limited inquiries they are dealing with extraneous matters and failing to hear and determine according to law.

That, in my view, is a mis-reading of the sub-section. The words of the sub-section describe the nature of the alterations to which it applies. If a proposed alteration falls within any of the named classes of alteration, then it is clear that it cannot be carried out without the consent of the justices. But if an alteration of one of these classes comes before the justices for their consent, it does not follow that the justices in dealing with it are limited to the consideration of the alteration itself solely from the point of view of the descriptive words contained in the sub-section. The justices are entitled, and are bound, to take into account whatever matters are relevant to the whole inquiry. There may well be some relevant matter which goes beyond the topics specified in the description of the alteration. In the present case it is true that the back gateway in question may have been in existence for some time without causing inconvenience, and that it may be at no little distance from the part of the premises where intoxicating liquor is sold. But it is incorrect to say that because of these considerations the proposed alteration is not related to the gateway. It is admitted that the proposed alteration has as its object the increase of the facilities for drinking. The importance of a means of access to licensed premises might increase according to the extent to which a proposed alteration would increase the facilities for drinking. A means of access to larger licensed premises might be of greater concern than a means of access to smaller premises.

Reference may be made in this connection to the case of *Bushell* v. *Hammond*. (1) The alterations in that case

(1) [1904] 2 K. B. 563, 568.

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were not alterations under the sub-section now in question, but were alterations which, on the renewal of a licence, the licensing justices directed should be made under s. 11, sub-s. 4, of the previous Licensing Act, 1902. Yet certain remarks made by Collins M.R. in the course of his judgment in that case and concurred in by the other two members of the Court of Appeal, seem to be very pertinent to the present case. He said: "I think that under sub-s. 4 the licensing justices, when determining the nature of the structural alterations which they shall require upon the renewing of a particular licence, are quite justified in taking into consideration the means of access to the part where intoxicating liquor is sold, and in deciding what alteration in the means of access is reasonably necessary to the proper conduct of the business." The sub-section under which that case arose, while it provided that the justices on renewing a licence might order that such alterations as they thought reasonably necessary to secure the proper conduct of the business should be made in that part of the licensed premises where intoxicating liquor was sold or consumed, had not a word to say about the means of access to the premises. Yet the view was there taken that the justices had jurisdiction to order that the back entrance to the premises should be closed. It follows that in the opinion of the Court of Appeal the means of access to the licensed premises was so closely related to the part of the premises where intoxicating liquor was sold that it might properly be taken into consideration by the justices in a case of the kind which was then before the Court. If the consideration of the means of access was appropriate and relevant to the alterations in a case of that kind, why should it not also be appropriate and relevant to the alterations which have to be dealt with in the present case? It seems to me that in the circumstances it is no less relevant and appropriate to these latter alterations. The merits of the case need not now be discussed, but there is one fact which leaps to the eye—namely, that this gateway, while it opens on one side into the yard of the licensed premises, will open on the other side into a public market.

There is no ground for saying that the justices have here considered extraneous or irrelevant circumstances, or that they have failed to hear and determine the case according to law.

In my opinion the order nisi should be discharged.

SWIFT J. I agree.

ACTON J. I agree.

Order Nisi discharged.

Solicitors: *Sharpe, Pritchard & Co., for Sedgwick, Turner, Sworder & Wilson, Watford; Stanley Robinson & Commin.*

J. R.

WEDDLE, BECK AND COMPANY *v.* HACKETT.

1928

Oct. 26; *Nov.* 14.

[1928. W. 2509.]

Stock Exchange—Broker and Principal—Payment of Differences—Illegal Contract at Common Law—Gaming and wagering Contract—Gaming Act, 1845 (8 & 9 *Vict. c.* 109), *s.* 18—*Gaming Act*, 1892 (55 *Vict. c.* 9), *s.* 1.

The plaintiffs, who were stockbrokers on the London Stock Exchange, employed B. as a half-commission man. The defendant entered into an arrangement with B. that he should speculate for him upon the Stock Exchange. B. was to buy and sell shares through his firm on behalf of the defendant, but the defendant was not to be obliged to take up, and was not expected to take up, any shares. B. was to buy shares on behalf of the defendant, and before they became due for delivery sell them again, and the defendant was to receive the profit or pay the loss upon the transaction—namely, the difference between the buying and the selling price of the shares. The arrangement at first was that the defendant's liability for losses should not exceed 50*l.*, but subsequently the defendant left it in B.'s hands to speculate for him. The plaintiffs accordingly entered into contracts on behalf of the defendant with stock jobbers for the purchase of shares, and subsequently for the sale of those shares. The jobbers did not know that the transactions were not genuine transactions, and that in due course the shares would not be taken up. These purchases were made subject to the rules and regulations of the London Stock Exchange, under which the plaintiffs became personally liable to the jobbers for the price of the shares. The plaintiffs debited the defendant with the amount which they paid for the shares and

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credited him with the amount which they received on their sale, and they claimed to recover from the defendant the balance which was due to them when the account was closed :—

Held, that the plaintiffs were entitled to recover, as the contracts which they on behalf of the defendant entered into with jobbers for the purchase of shares were not wagering or gaming contracts, but were genuine contracts for the purchase and sale of the shares, and that the fact that as between the defendant and B. the transactions were intended to be gambling transactions, did not disentitle the plaintiffs from recovering, because the transactions were carried out with an innocent third party who regarded them as genuine.

ACTION tried before Swift J. under Order XIV. as a short cause.

The following statement of facts is taken from the judgment :—

In this case the plaintiffs, Messrs. Weddle, Beck & Co., claim as members of the London Stock Exchange a sum of 317*l.* 19*s.* 6*d.*, alleged to be the balance owing by the defendant, Mr. Leonard Hackett, to them in respect of the purchase and sale of shares effected by the plaintiffs for and at the request of the defendant.

The action came on for trial before me on October 26, and certain correspondence having been put in and evidence given on behalf of the plaintiffs I reserved my decision in order that I might more fully consider whether on the state of facts which I was of opinion had been proved the plaintiffs were entitled in law to recover, or whether their action was barred as being one contrary to law, inasmuch as it was an action endeavouring to enforce a wagering contract.

The evidence proved to my mind, and I find as facts, that at the beginning of the year 1927 Mr. Leonard Hackett, the defendant, and Mr. C. T. Bonnard, were fellow members of a golf club. Mr. Hackett was entirely ignorant of the methods of business on the Stock Exchange, but he had heard that some of his friends had made some money by speculating on the Stock Exchange through the medium of his fellow member of the golf club, Mr. Bonnard, and he approached Mr. Bonnard with a view to following the example of his successful friends and making money for himself by speculating.

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Mr. Bonnard was a half-commission man with the plaintiffs —that is to say, he was employed by them as a clerk; his agreement with them was that he should receive half the commission which was earned on any transactions for clients introduced by him, and that he should pay half the loss on any bad debts contracted by them in consequence of dealing with clients introduced by him.

When Mr. Hackett approached Mr. Bonnard he told Mr. Bonnard he would like to take a hand in a speculation, and that he had got 30*l.* to 50*l.* which he could lose, and the arrangement was made between them that Mr. Bonnard should buy and sell shares on Mr. Hackett's behalf in order that Mr. Hackett should make money if successful, but should not lose more than 50*l.* if by any chance—which neither of these parties ever seem to have contemplated—he should be unsuccessful.

The method by which the speculation was to be carried out was undoubtedly that Mr. Bonnard through his firm should purchase shares on behalf of Mr. Hackett, and if those shares increased in value between the time that their purchase was made and the time that delivery of them should have been taken they should be sold at a profit, and if, which was considered an unlikely contingency, the shares depreciated in value they should be sold at a loss and the proceeds reinvested in other undertakings. I am satisfied, and I find as one of these facts, that the defendant, Mr. Hackett, never contemplated the possibility of losing more than, at the most, 50*l.*

In pursuance of the arrangement thus made between them Mr. Bonnard, acting as clerk to the plaintiff firm, Messrs. Weddle, Beck & Co., purchased from Messrs. Isaacs & Bray, a firm of stock jobbers, 250 United British Oilfields of Trinidad shares at 14*s.* 1½*d.* each, and the purchase price of which, including stamps, registration fee and brokerage amounted to 180*l.* 6*s.*

That purchase was duly intimated to the defendant by a bought note from the plaintiff firm addressed to the defendant, saying: "Dear Sir, We have bought by your order as

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under-noted subject to the Rules and Regulations of the London Stock Exchange. Names into which stocks and shares are to be registered should be sent to us by return of post. Yours faithfully. For settlement 24th February, 1927. 250 United British Oilfields of Trinidad, Lim., shares at 14*s*. 1½*d*."

That note was sent to the defendant with a covering letter, signed by Mr. Bonnard, which was as follows: "Dear Leonard. Enclosed you will please find contract for the purchase of 250 U. Boats [United British Oilfields of Trinidad Lim.] I am told there is quite a reasonable appreciation to be seen in these, but I think if they go up a shilling or so per share we should be contented. I sincerely hope this is going to be a winner as it is the first time we have had any of this line of business together."

On February 24 those shares had depreciated in value, and Mr. Hackett paid a sum of 9*l*. 8*s*. 6*d*. in respect of them.

There were apparently conversations between Mr. Bonnard and Mr. Hackett after that payment, and on March 8 Mr. Bonnard made a purchase of 200 V. O. C. Holding shares at 4$\frac{1}{16}$ on behalf of Mr. Hackett, and in the letter of March 8 Mr. Bonnard says: "My dear Leonard. I enclose contract for the purchase of 200 V. O. C.'s at 4$\frac{1}{16}$. U. Boats seem to sag every day. The output of oil for this month is slightly reduced to that for last month, and should they fall any more I think I shall cut a loss and try and make it up on other things—but leave it to me."

On March 15 Mr. Hackett paid a sum of 22*l*. 8*s*. 9*d*. to the plaintiffs, which was credited to his account, but at the end of March that account showed a balance of 59*l*. 13*s*. 1*d*. owing by the defendant to the plaintiff firm. Interviews between Mr. Bonnard and the defendant took place, and I find as a fact upon the evidence that the defendant was not ready or willing to find any more money. Mr. Bonnard, however, offered to finance Mr. Hackett, assuring him that he would be able to get him out of his difficulties without loss, and that ultimately guided by his (Mr. Bonnard's) advice he would make a profit out of his transactions on the Stock Exchange. Mr. Hackett yielded to the persuasions of Mr. Bonnard to

allow the account to remain open and to leave everything in Mr. Bonnard's hands in order that the latter might, by continuing to speculate, retrieve the losses which Mr. Hackett had already incurred. To use Mr. Bonnard's own language: "Mr. Hackett left it absolutely in my hands to deal for him."

From the end of March Mr. Bonnard financed the transactions. For the account which showed a debit of 59*l.* 13*s.* 1*d.* Mr. Bonnard paid his firm, and subsequently recovered a part of it back from the defendant, and he went on buying and selling shares on behalf of Mr. Hackett until the firm eventually closed the account, leaving a balance due to them from the defendant of 317*l.* 19*s.* 6*d.*

I am quite satisfied, and I find as a fact, that as between the defendant and Bonnard the arrangement was that the former should not be obliged to take up, and was not expected to take up, any shares. It was a pure gambling transaction, recognized by both as such, and spoken of quite openly in their conversations and correspondence as being such. The arrangement was that Bonnard should buy shares on behalf of the defendant and, before they became due for delivery, sell them again and receive the profit or pay the loss which their rise or fall had entailed.

I have no evidence at all as to what knowledge the plaintiffs had of this arrangement, and I must assume as far as they were concerned, except in so far as they are affected by the knowledge of Bonnard their clerk and agent, that they believed the transactions to be genuine investments on the part of the defendant.

I am satisfied on the evidence that the plaintiffs, either through one of their partners or their representative or Bonnard, entered into contracts with stock jobbers for the purchase of shares, and I have no reason to suppose that the jobbers, from whom the shares were agreed to be bought, did not believe that they were genuine transactions, and that in due course the shares would be taken up on behalf of the plaintiffs' client. The plaintiffs bought and sold shares on behalf of the defendant, debiting him with the amounts which they paid for the shares and crediting him with the amounts

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which they received for them, with the result that when they closed the account there was a balance of 317*l.* 19*s.* 6*d.* alleged to be due from him to them.

H. G. Robertson for the plaintiffs.

Salter Nichols for the defendant.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

Nov. 14. SWIFT J. [read a judgment setting out the facts stated above and continued :] It is for that balance accruing in the way which I have described that this action was brought by specially indorsed writ, and an application was made for summary judgment. In answer to that summons the defendant filed an affidavit, which contains the grounds of his defence, and upon that affidavit leave to defend was given to him, and I have to determine upon evidence before me whether the allegations made in that affidavit afford any answer to the plaintiffs' claim, or whether they have made out their case and are entitled to judgment.

The points which are raised by the defendant's affidavit and in argument by his counsel are :—

1. That he never employed the plaintiffs at all to enter into transactions on his behalf ;

2. That he never authorized Mr. Bonnard to enter into any transactions beyond a limit of 50*l.* ;

3. That there was no evidence of any real transactions between the plaintiffs and third parties upon which they could have been held to have been obliged to pay money on behalf of the defendant for shares which they had purchased for him and so become entitled to recover it from him ; and

4. That the transactions are void and unenforceable under the Gaming Acts, and further that under the said Acts the plaintiffs are not entitled to recover any moneys which they have paid away ostensibly on his behalf or in commissions.

As to the first of these contentions I am of opinion that from the first the defendant knew that the plaintiffs were acting as stockbrokers on his behalf. It is perfectly true

that he imagined that they were only acting as brokers for the purpose of enabling him to speculate in differences, but I am quite satisfied that he knew, recognized and approved of the fact that in order to carry out the scheme of speculation which he and Bonnard had agreed upon between them the plaintiffs were being employed on his behalf to act as brokers. The first transaction, as indeed every subsequent one, was carried through by means of a bought note similar to the one which I have read, and it is impossible to hold that the defendant did not well know that the plaintiff firm was acting on his behalf as brokers, and I therefore disregard this contention.

As regards the second of the defendant's contentions I am satisfied that at the beginning of the transactions the defendant did not authorize Bonnard to incur any liability on his behalf beyond the sum of 50*l*., but I am also satisfied that when that sum had been exceeded he agreed, under the persuasions of Bonnard, to keep the account open and to further pledge his credit in the hope of getting out of his difficulties and recovering his losses. The letter of July 4 which Mr. Bonnard sent to the defendant, and which reads as follows: "My dear Leonard, I will finance the show as arranged. Let me have the amount as fixed between us. Sorry you did not come over last night. Markets are bloody but I don't think it will be long before they turn and then we shall be O. K. Cherio," satisfies me that some arrangement had been made by which Bonnard was to finance the transactions, and the subsequent payment of 20*l*. by the defendant on July 15 shows that the original arrangement to limit his liability to 50*l*. had gone. I think, and, on the evidence of Mr. Bonnard, I find as a fact, that the defendant had lost his 50*l*. He agreed that Bonnard should finance him to get him out of the trouble, and I understand that to mean that, until either he (the defendant) or the plaintiffs closed the account, Bonnard might go on speculating on the defendant's behalf. It was a foolish and improvident bargain, but in the face of the evidence I cannot say that it was not made. Indeed, I think and hold as a fact that it was.

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At the trial Mr. Salter Nichols, on behalf of the defendant, submitted to me that there was no evidence of any real transactions of the plaintiffs and third parties upon which they could be held to have been obliged to pay money on behalf of the defendant for shares which they had purchased for him and so entitle them to recover it from him. I do not think this contention is sound. Mr. Bonnard swore, and I have no reason for doubting it, that in fact the plaintiff firm did buy from jobbers and were under a liability to take up from them shares in respect of each of these transactions. The contract note was produced in the first case, and he swore that the business was carried through in exactly the same way in all the subsequent ones, and I accept this. I find that there were real transactions entered into by the plaintiffs with third parties for the purchase and sale of shares by them on behalf of the defendant.

The point which was raised under the Gaming Acts is a point which has given me real difficulty in this case. As between Bonnard and the defendant there is no doubt, as I have said above, that these were gambling transactions. There was no intention of doing any genuine business in the purchase and sale of shares; the only object which they had in mind was speculation in differences; and what I have to determine is whether there is in such an arrangement anything which is illegal so as to prevent the plaintiffs from recovering money which they have expended on behalf of the defendant in furtherance of such a scheme.

I am of opinion that unless it can be shown that the contracts which the plaintiffs entered into on behalf of the defendant were wagering contracts so as to be void within the statute 8 & 9 Vict. c. 109, and so as to make the agent incapable of recovering his money under the provisions of the Gaming Act, 1892, there is nothing which is illegal in what the plaintiffs did, and nothing to prevent them from recovering from the defendant moneys which they have expended on his behalf and in pursuance of those contracts.

The question which seems to me to call to be determined is whether the contracts formed between the jobbers and the

defendant through the agency of the plaintiffs were or were not wagering contracts. If they are wagering contracts then they are void, and the plaintiffs should not have paid money under them to the third parties and cannot recover it from the defendant on whose behalf they paid. I think the Gaming Act, 1892, would be clearly applicable. But if, on the other hand, they are not wagering contracts, then it seems to me that whatever the intentions of the defendant may have been as to taking up the shares or not he is bound to pay the moneys which have been advanced for him by the plaintiffs for payment of the money due under those contracts.

Now a wager or wagering contract was defined by Hawkins J. in *Carlill* v. *Carbolic Smoke Ball Co.* (1), in quite clear terms, which, so far as I am aware, have never been questioned. In that case he said (2): "The third question is whether the contract I have found to exist is a contract by way of gaming or wagering within the meaning of statute 8 & 9 Vict. c. 109, s. 18, which renders such contracts null and void, and, therefore, not enforceable by action. I think it is not. It is not easy to define with precision what amounts to a wagering contract, nor the narrow line of demarcation which separates a wagering from an ordinary contract; but, according to my view, a wagering contract is one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties. It is essential to a wagering contract that each party may under it either win or lose, whether he will win or lose being dependent on the issue of the event, and, therefore, remaining uncertain until that issue is known. If either of the parties may win but cannot lose, or may lose

(1) [1892] 2 Q. B. 484. (2) [1892] 2 Q. B. 490.

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but cannot win, it is not a wagering contract. It is also essential that there should be mutuality in the contract. For instance, if the evidence of the contract is such as to make the intentions of the parties material in the consideration of the question whether it is a wagering one or not, and those intentions are at variance, those of one party being such as if agreed in by the other would make the contract a wagering one, whilst those of the other would prevent it from becoming so, this want of mutuality would destroy the wagering element of the contract and leave it enforceable by law as an ordinary one: see *Grizewood* v. *Blane* (1); *Thacker* v. *Hardy* (2); *Blaxton* v. *Pye*." (3)

Accepting that definition of a wagering contract I find it impossible to come to the conclusion that the contracts which the plaintiffs entered into with third parties on behalf of the defendant were in any sense wagers. It is perfectly true that they were contracts entered into in order to enable the defendant to gamble in differences. The defendant never intended to take up the shares; his only object in entering into the contracts was to speculate in the difference of their values at different dates. There is no evidence whatever before me, and indeed the evidence is the other way, that the third parties had any such intention. They entered into the contracts as genuine transactions for the sale and purchase of shares which they were bound to deliver or to take up when called upon to do so, and there is a complete lack of that mutuality which is essential before the wagering element can enter into a contract so as to render it void and unenforceable.

I am fortified in this view by a passage which was cited to me by Mr. H. G. Robertson from Schwabe and Branson on the Law of the Stock Exchange, 2nd ed., p. 249, which I accept and adopt, and which is as follows: "It may, then, be stated as a general rule that, apart from very unusual circumstances, a contract made on the Stock Exchange, or upon any provincial Stock Exchange with similar rules and

(1) (1851) 11 C. B. 526. (2) (1878) 4 Q. B. D. 685.
(3) (1766) 2 Wils. 309.

usages, and whether between principals direct or through an agent, is not made by way of gaming and wagering. The mere fact that a contract purports to be subject to such rules is not conclusive, and will not exclude evidence that there was in fact a tacit understanding that, in spite of the form of the contract, there should be no obligation on either party to take or deliver, but that in any event differences only should be payable. If such an understanding were established by the evidence, the contract would be null and void."

In this case I cannot find that there was any understanding established by evidence, or indeed any evidence that the third parties entered into any tacit understanding that in spite of the formal contract there should be no obligation on either party to take or deliver, but that in any event differences only should be payable as between the defendant and the third parties. I think they were genuine contracts, although those genuine contracts were only intended by the defendant and by Mr. Bonnard to be a means by which the defendant might gamble.

Then it was contended by Mr. Salter Nichols that if there was an arrangement, such as I have in fact found, between Bonnard and the defendant, that the defendant should not be obliged to take up the shares but should only pay differences, the contracts would be unenforceable and the plaintiffs not entitled to recover the money which they had advanced. I do not think that this is right. There is no law in this country against betting or wagering generally, and it is not illegal for two people to agree together that they should carry out transactions with an innocent third party which they intend shall really amount to no more than speculative transactions, but which from the point of view of the third party are genuine. For example, for two people to agree that one shall buy a horse for the other from a third party with the intention of selling it next day at a higher price if they can get it and a lower one if they cannot, is not illegal nor is it betting or wagering within the meaning of the statutes which would render wagering contracts void. It is

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an agreement to speculate, and as far as I can ascertain such an agreement is not illegal.

In the case of *Iremonger & Co.* v. *Dyne* (1) Scrutton L.J. said: "The question in the case might be stated very shortly. The action was brought on twelve contracts of purchase of foreign exchange. The defence set up was that these were gaming contracts unenforceable under the Gaming Act. The transactions between the plaintiffs and the defendant extended over three years, although the particular amount sued for covered only the period of two months in 1926 and 1927. . . . . In considering the summing up we must have regard to the course which the case took at the trial. He was not going to attempt exhaustively to define what was a gaming or wagering contract. Lord Justice Cotton had attempted a definition in *Thacker* v. *Hardy* (2) when he said: 'The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature—that is to say, if the event turns out one way A. will lose, but if it turns out the other way he will win.' With great respect, he thought that that definition was not exhaustive. If goods were sold to be delivered three months hence at a fixed price, and the price fell below or went above that figure, the price at the date fixed would determine whether there was a profit or a loss; but that was not a gaming or wagering contract. Lord Justice Cotton had omitted any such consideration as that. Assume the case of the Grand National and a horse called Tipperary Tim, and A. and B. agreed that if Tipperary Tim did not win A. would pay 1*l.* to B., but that if it did, B. would pay 100*l.* to A.; that was a bet, because neither of them had any interest in the horse except their agreement about the money to be paid if the horse should win or lose. But if the contract was that A. said that he would buy Tipperary Tim for 200*l.*, and, if he won the Grand National, he would pay another 800*l.*, a matter which depended on a future event, that was not a gaming transaction because they had a proprietary

(1) (1928) 44 Times L. R. 497, 498, 499. (2) 4 Q. B. D. 685, 695.

interest in the subject-matter—Tipperary Tim—which passed from one to the other. A number of similar examples might be given in commercial matters, as in the case of goods to be delivered three months hence, the price of which would depend on the market and would determine whether the seller would get out with a profit or not. That rested on matters over which he had no control, but if the contract was to result in the delivery of goods or in the passing of property it was not gaming or wagering. If it were a contract in which differences in prices were to be paid it was not a gaming contract unless it could be shown that there was an agreement between the parties that the purchaser had no right to claim delivery of the goods and the seller had no right to claim acceptance. The question to be considered here was whether the transactions were such that nothing was to happen except payment of differences, or whether currency was to be delivered. That depended on the agreement between the parties, and it had been agreed by counsel in the Court below that the question to be left to the jury was that which had been put by Mr. Justice Cave in *Universal Stock Exchange, Ld.* v. *Strachan* (1) to the jury and was approved by the House of Lords. What Mr. Justice Cave said was this : 'The question which you have to try is whether these transactions were real bargains for purchase of stock, or whether they were simply gambling transactions intended to end in the payment of differences. . . . . A man goes to a broker and directs him to buy and sell so much stock, as the case may be. That may be, in the eye of the purchaser, a gambling transaction, or it may not. If he means to invest his money in the purchase of the stock which he orders to be bought, that undoubtedly is a perfectly legitimate and real business transaction. If he does not mean to take up his stock, if he means to sell again before the settling day arrives, that may be a gambling transaction so far as he is concerned, but it is not necessarily a gambling transaction so far as the broker is concerned ; and in order to be a gambling transaction such as the law points at, it must be a gambling

(1) [1896] A. C. 166, 167.

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transaction in the intention of both the parties to it.' After referring to the 'terms of business' that judge concluded thus: 'Notwithstanding those ostensible terms of business, was there a secret understanding that the stock should never be called for or delivered, and that differences only should be dealt with? If there was that secret understanding, then the plaintiff is entitled to recover his securities. If there was not that secret understanding, then he is not entitled to recover them, and that is the only question with which I need trouble you.'"

In these circumstances I have come to the conclusion that the defendant has no answer to the claim which is made upon him by the plaintiffs. On the contrary I think that they have established the fact that he is indebted to them in the sum of 317*l.* 19*s.* 6*d.* I give judgment for the plaintiffs accordingly with costs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Smallman & Son.*
Solicitors for defendant: *Corsellis & Berney.*

R. F. S.

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Employer and Workman—Agricultural Labourer—Wages—Employment by the Week—Public Holiday—Refusal of Payment of Wages—Agricultural Wages (Regulation) Act, 1924 (14 & 15 *Geo.* 5, *c.* 37), *ss.* 1, 2 *sub-ss.* 1, 4; *s.* 16, *sub-s.* 1.

By an order of the Agricultural Wages Board, embodying orders of a wages committee, "Where a whole-time male worker is employed by the week or any longer period and the hours of work agreed between the worker and the employer in any week (excluding hours of overtime employment) are less than 50 in summer and 48 in winter, the rate of wages applicable to that worker shall be such as to secure to the worker the wages which would have been payable if the agreed hours had been 50 in summer or 48 in winter as the case may be."

The appellants employed one T. as an agricultural labourer by the week of fifty hours at 30*s.* per week. On Good Friday, T., according to custom, was not required by the appellants to work, and in consequence they refused at the end of the week to pay him his full weekly wages, deducting the portion appropriate to that day, but gave him, according to their custom, a small bonus instead:—

Held, that the above order was intra vires, and that T. was entitled to be paid 30*s.* for the Good Friday week.

CASE stated by Chelmsford justices.

On May 4, 1928, an information was preferred by the respondent, William Morgan Jones, an officer appointed under the Agricultural Wages (Regulation) Act, 1924 (14 & 15 Geo. 5, c. 37) (1), against the appellants,

(1) Agricultural Wages (Regulation) Act, 1924 (14 & 15 Geo. 5, c. 37):

Sect. 2, sub-s. 1: "Subject to the provisions of this Act, agricultural wages committees shall fix minimum rates of wages for workers employed in agriculture for time work, and may also, if and so far as they think it necessary or expedient, fix minimum rates of wages for workers employed in agriculture for piece work."

Sub-s. 4: "In fixing minimum rates a committee shall, so far as practicable, secure for able-bodied men such wages as in the opinion of the committee are adequate to promote efficiency and to enable a man in an ordinary case to maintain himself and his family in accordance with such standard of comfort as may be reasonable in relation to the nature of his occupation."

Sect. 7, sub-s. 1: "Where any minimum rate of wages has been made effective by an order of the Agricultural Wages Board under this Act, any person who employs a worker in agriculture shall, in cases to which the minimum rate is applicable, pay wages to the worker at a rate not less than the minimum rate, and, if he fails to do so" shall be liable to penalties.

Sect. 16, sub-s. 1: "The expression 'employment' means employment under a contract of service or apprenticeship, and the expressions 'employed' and 'employer' shall be construed accordingly."

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W. Seabrook & Sons, Ld., of the Nurseries, Boreham, Chelmsford, for that they, being employers of workers in agriculture in a case to which minimum rates of wages, made effective by an Order (No. 256) of the Agricultural Wages Board, dated October 25, 1927, were applicable, did, on April 6, 1928, unlawfully fail to pay wages at not less than the minimum rate to Robert James Twinn, one of the said workers, contrary to s. 7, sub-s. 1, of the said Act (1), and the orders of the Agricultural Wages Board and agricultural wages committee. (1)

The information was heard at the court of summary jurisdiction sitting at the Shire Hall, Chelmsford, on May 11, 1928. At the hearing the following facts were admitted or proved.

The appellants' place of business was The Nurseries, Boreham, near Chelmsford, and Twinn was engaged by them by the week in agricultural work. No written agreement as to service, hours of work, rates of pay or other matters was entered into at any time, but Twinn worked and was paid in accordance with the appellants' customary hours of work and rates of pay. During a normal week from Saturday

Order of the Agricultural Wages Board dated October 25, 1927 (No. 256). Schedule, clause 1: "The wages payable for employment in summer and in winter (as hereinafter defined) shall be not less than wages at the following minimum rates: (*a*) Male workers 21 years of age and over, 30*s*. per week of 50 hours in summer and 48 hours in winter."

Clause 2: "Where a whole-time male worker is employed by the week or any longer period, and the hours of work agreed between the worker and the employer in any week (excluding hours of overtime employment) are less than 50 in summer or 48 in winter, the rate of wages applicable to that worker shall be such as to secure to the worker the wages which would have been payable if the agreed hours had been 50 in summer and 48 in winter as the case may be."

Clause 3: "For the purpose of the above rates, employment in summer shall be deemed to be employment during the period commencing on the second Monday in February, and ending on the second Sunday in November, and employment in winter shall be deemed to be employment during the rest of the year."

Clause 4: "For the purpose of the above rates the hours of work shall not include meal times, but shall include any time during which by reason of weather conditions, an employer has prevented from working a whole-time worker who was present at the place of employment and ready to work."

(1) Ante p. 335, note (1).

to Saturday (in summer) Twinn was required by the appellants in accordance with the custom of their business to work fifty hours—namely, on Monday to Friday from 7 A.M. to 12 noon, and from 1 P.M. to 5 P.M. (forty-five hours), and on Saturday from 7 A.M. to 12 noon (five hours). The appellants paid him by the week 30*s.*, less 9*d.* national health insurance, being at the rate of $7\frac{1}{5}d.$ per hour. On March 30, 1928, the appellants posted a notice, which was seen by Twinn, as follows: "Good Friday, April 6 . . . . Employees will not be required on this day and work cannot be found for them. Pay for half a day will be given." This was in accordance with the custom of the business. Accordingly on that day Twinn did not present himself for work, and in that week he only worked forty-one hours—namely, the hours as above set out less the full nine hours on Good Friday, and he was paid for forty-one hours at the rate of 30*s.* for fifty hours—namely, 1*l.* 4*s.* 8*d.* (less 9*d.* insurance), plus 2*s.* 9*d.* half day's bonus, a total of 1*l.* 6*s.* 8*d.*

It was contended by the appellants that Twinn was not entitled to receive any higher pay, and that cl. 2 of Order 256 of the Agricultural Wages Board (1) was ultra vires.

The justices were of opinion (1.) That no clause or part of Order 256 was ultra vires and that the whole of the order was intra vires. (2.) That Twinn was entitled to receive the full minimum wage of 30*s.* (less insurance) in respect of Good Friday week, whether he worked for the full fifty hours or for a shorter period. (3.) That the notice of March 30, 1928, as to non-employment on Good Friday, having been accepted and acted upon by Twinn constituted a valid variation of the terms of the original agreement between him and the appellants, and that cl. 2 of the above Order 256 (1) applied. (4.) That if the said notice did not constitute a valid variation of the original agreement, Twinn was still entitled under cl. 1 of the order (1), the appellants by their notice having made it impossible for him to work the full fifty hours. They accordingly convicted the appellants and fined them, but stated this case.

(1) Ante p. 335, note (1).

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Comyns Carr K.C. and *Eve* for the appellants. The justices were wrong. There is nothing in the Act which compels employers to pay for time which is not worked. All that s. 2, sub-s. 1, of the statute enables wages committees to do is to fix "minimum rates of wages," not "minimum wages." In fixing the minimum wage as that which would have been payable if the agreed hours had been fifty, cl. 2 of Order 256 of the Agricultural Wages Board has prescribed an impossibility, for in Good Friday week it would have been impossible to work for fifty hours, unless the workman worked on Good Friday or Sunday, for the work must be done by daylight. The order is therefore ultra vires. If the Crown is right the provision in cl. 4 of the order (1) is unnecessary, for the hours during which weather conditions prevent work would be part of the week of employment, and the worker would be entitled to wages in respect thereof. When the Act directs committees to fix a rate of wages it cannot mean that they can fix a different rate for a week in which there happens to come a public holiday or holidays, which is what has, in effect, been done in the present case. Every one has the right to make a contract for himself and any Act which impinges on this right should be strictly construed.

Sir Thomas Inskip A.-G., *Hubert Hull* and *Ifor Lloyd* for the respondent. The justices were right. With regard to the suggestion that the Act interferes with the right of freedom of contract it is important to notice that by cl. 1 of Sch. I. to the Act the wages committees are to be constituted of members representing employers and workers in agriculture in the county and therefore well acquainted with the conditions of agriculture in the district, and this quite apart from the presence of impartial members appointed by the Minister and of a chairman also appointed by the Minister. The argument for the appellants depends largely on a misinterpretation of the word "employment" in the Act as meaning both "actual work" and "contract of employment." But by the definition in s. 16, sub-s. 1, it means "employment under a contract of service." (1) Clause 2 of Order 256, read in the light of that definition becomes quite clear and means,

(1) Ante p. 335, note (1).

"Where the worker is under a contract of employment for a week, etc."

Comyns Carr K.C. replied.

LORD HEWART C.J. This is a case stated by justices which raises an interesting point under the Agricultural Wages (Regulation) Act, 1924. The justices had to consider whether a certain order made by the Wages Board on the initiative of the agricultural committee was ultra vires in whole or in part. They came to the conclusion that the whole of it was intra vires, and accordingly that the agricultural worker referred to was entitled to receive the full minimum wage of 30*s.*, less national health insurance, in respect of the Good Friday week, whether he worked for the whole fifty hours or for a shorter time. Holding those views, and others which are consequential upon them and are set out in the case, the justices fined the present appellants; and the question for this Court is whether, in so holding, the justices came to a correct determination in point of law.

In our opinion the key to the matter is to be found in s. 16, sub-s. 1, of the Act, the definition section. (1) Throughout the ingenious argument of counsel for the appellants, one could not fail to observe that the term "employment" was used from time to time in two quite different senses, as if those different senses were the same. It is obvious that in ordinary speech the term "employment" may mean a contract of employment, or, on the other hand, may mean actual work; and it makes all the difference in construing different parts of this Act, and different parts of the orders made under it, whether one realizes the sense in which the term "employment" is used. By s. 16, sub-s. 1, it is clearly provided that the expression "employment" means "employment under a contract of service or apprenticeship." It does not mean actual working at the moment. It was with that definition in view that the agricultural committees which, as the learned Attorney-General has reminded the Court, are representative bodies very carefully chosen from all parties interested, approached the task of fixing the

(1) Ante p. 335, note (1).

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minimum rates of wages, under s. 2, a section which includes sub-s. 4: "In fixing minimum rates a committee shall, so far as practicable, secure for able-bodied men such wages as in the opinion of the committee are adequate," etc. There is nothing in the Act to say that the committee may fix the rate per hour, but not the rate per week; on the contrary, it provides expressly that such minimum rates may be fixed by the committee so as to apply universally to all workers or to any special class of worker or any special area or to any special class in a special area, subject to any exceptions which may be made, and so as to vary, according as the employment is for a day, week, month or other period or so as to provide a differential rate in the case of overtime. The order, with a particular part of which this case has to do, is an order relating to a whole-time male worker employed by the week. Addressing themselves to the task of fixing a minimum rate for such a worker, the committee came to the conclusion that if he is twenty-one years old or older, he ought to have at least 30*s.* a week, that week being normally one of fifty working hours. Then it immediately occurred to their minds that although in practice that was the week, there might be an agreement for what was nominally a week, but which involved less than fifty hours of employment or actual work, and so they provided that, even so, the worker should have his wages at the minimum rate per week secured to him, because in his case the rate of wages applicable to him should be made such as to secure to him the amount of wages which would have been payable if the agreed hours had been fifty. In my opinion there is nothing ultra vires in that part of the order. Nor do I think that that part needs to be invoked for the purpose of justifying what was contended here, namely that the agricultural worker was a male worker of full age employed by the week, and as such was entitled to the minimum wage per week. It matters not that in the particular week there came Good Friday. In my opinion the justices were right for the reasons which they gave, and the contentions of the respondent prevail in the case. I think, therefore, this appeal ought to fail.

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AVORY J. I am of the same opinion. Once it is admitted that the committee had power to make or fix the rate of wages of 30*s.* per week for male workers of twenty-one years and over, I think it cannot be said that they were acting ultra vires in providing that although normally 30*s.* a week was to be paid for fifty hours work in summer and forty-eight hours in winter, if in any particular case the employers chose to agree that the worker need not work the whole of the fifty hours or forty-eight hours, as the case might be, that then, in that case, the man should still be entitled to his 30*s.* for the week. Having come to that conclusion, I can see nothing ultra vires in these regulations taken as a whole; and, therefore, I agree that the appeal fails.

ACTON J. I agree.

Appeal dismissed.

Solicitors for appellants: *Ellis & Fairbairn.*

Solicitor for respondent: *Solicitor to the Ministry of Agriculture and Fisheries.*

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SHANKS *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Super-tax—Right of Residence Rent Free given by a Testator to two Persons—Gift to same Persons of Money for Payment of Rates, Taxes and Outgoings—Liability to Assessment to Income Tax under Sch. A—Inclusion of Part of annual Value and of Money in total Income for Super-tax Purposes—Income Tax Act, 1918 (8 *& 9 Geo.* 5, *c.* 40), *ss.* 1, 5, 19, 20—*Sch. A, Rule VII., rr.* 1, 2.

A testator by his will declared that his widow and daughter should "be entitled to the personal use, occupation and enjoyment free of rent (in case and so long as they or either of them shall desire the same) of my residence Duneevan"; and directed his trustees out of the income of his residuary estate to pay to his widow and daughter the annual sum of 2000*l.* towards the upkeep of the house and payment of rates, taxes and outgoings without his trustees being under any obligation to see to the application thereof. And he declared that if both his widow and daughter should give notice in writing to the trustees declining to exercise the option or should for a period of six months cease to reside in the house, then the trust for payment of the yearly sum of 2000*l.* was to cease and the house to fall into his residuary real estate. During 1925–1926 the widow and daughter resided in the house and received the sum of 2000*l.* In the computation of the total income of the daughter for that year (which forms the basis of super-tax for 1926–7) the Commissioners for the Special Purposes of the Income Tax Acts included half the annual value of the house for the purposes of Sch. A of the Income Tax Act, 1918, and half the sum of 2000*l.* The daughter contended that neither sum should be included:—

Held, (1.) that tax under Sch. A was not charged in respect of the ownership of property but on profits or gains arising from the beneficial occupation of property, so that it was chargeable in respect of the right to the personal use and occupation of Duneevan rent free, although the right could not be converted into money by assigning or letting the house.

London County Council v. *Attorney-General* [1901] A. C. 26 applied.

Tennant v. *Smith* [1892] A. C. 150 explained.

Inland Revenue Commissioners v. *Wemyss* (1924) 8 Tax Cas. 551 distinguished.

Miller v. *Inland Revenue Commissioners* 1928 S. L. T. 570 not followed.

(2.) That the annual value of property would therefore be properly included in the total income of a single person enjoying such a personal right for super-tax purposes.

(3.) That the fact that there were two persons enjoying such a personal right over Duneevan only affected the proportion of the annual value which should be included in a return of the total income of one of them, and that this question of quantum having been determined by the Commissioners their decision could not be disturbed.

(4) That the proportion of the sum of 2000*l.* determined by the Commissioners was also properly included in the daughter's returns of total income for super-tax purposes.

APPEAL from the decision of Rowlatt J. upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners held on October 27, 1927, for the purpose of hearing appeals, Mrs. Diana Marion Shanks appealed against an assessment to super-tax in the sum of 3406*l.* for the year ending April 5, 1927, made upon her under the provisions of the Income Tax Acts.

In the computation of Mrs. Shanks' total income for the year 1925–26 (which forms the basis for super-tax for 1926–27) there had been included (*a*) 106*l.* 12*s.* 6*d.*, being one-half of the net annual value for the purposes of Sch. A of the Income Tax, 1918, of a house called Duneevan at Weybridge, and (*b*) 1000*l.*, being one-half of a sum of 2000*l.*, hereafter referred to; and the only question for the Court is whether or not these sums form part of Mrs. Shanks' total income for super-tax purposes for the year in question.

Mrs. Shanks is the only daughter of Charles Henry Champness, who died on April 14, 1925, and whose will, dated December 7, 1920, contained the following provisions:—

"5. Subject to the provisions hereinafter contained concerning the furniture and effects in or upon my residence Duneevan aforesaid, I bequeath to my wife and my said daughter jointly all my watches, jewels, trinkets, personal ornaments, and wearing apparel, and all my furniture, pictures, prints, statuary, musical instruments, plate, plated goods, linen, glass, china, books and manuscripts, and all other articles of personal, domestic or household use or ornament, wines, liquors and consumable stores, and all my horses, carriages, motor cars, harness, saddlery and necessaries.

7. I declare that my wife and my daughter . . . . (but as regards my wife only so long as she remains my widow and does not remarry) shall be entitled to the personal use, occupation and enjoyment free of rent (in case and so long as they or either of them shall desire the same) of my residence Duneevan aforesaid, with the stables, coach house, garage, gardens, pleasure grounds (including the gardens belonging to me on the other side of Oatlands Drive) and appurtenances

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thereunto belonging or held thereunder, and the furniture and effects of domestic, stable or garden use or ornament which at the time of my death shall be in or upon the same or appropriated thereto. . . . . And I direct my trustees out of the income of my residuary estate to pay to my said wife and daughter, or such one of them as shall reside at Duneevan, the yearly sum of 2000*l.* towards the upkeep of the house and the payment of rates, taxes, wages, housekeeping and other outgoings without my trustees being under any obligation to see to the application thereof.

8. Provided always and I declare that if both of them my said wife and daughter shall give notice in writing to my trustees that they do not intend to exercise the option conferred by the last preceding clause or if neither of them my said wife and daughter shall for a period of six calendar months reside at Duneevan aforesaid then and in either of such cases the trust for payment of the said sum of 2000*l.* shall cease and determine and the said hereditaments shall fall into my residuary real estate and become subject to the trust for sale hereinafter contained and the said furniture and effects shall fall into the bequest of furniture and effects contained in clause 5 hereof."

Then followed in clauses 9 to 13 of the will a devise and bequest of the residuary real and personal estate to the trustees upon trust for sale and to hold the net proceeds of sale upon the trusts therein mentioned.

During the whole of the year 1925–26 Mrs. Shanks and her mother resided in the house Duneevan, and during that year the trustees of the will paid to them the sum of 2000*l.* referred to in clause 7 of the will.

It was contended by counsel on behalf of Mrs. Shanks that no part of the annual value of the house Duneevan and no part of the 2000*l.* paid by the trustees under clause 7 of the will was her income for the purposes of super-tax.

For the Crown it was contended (inter alia) that one-half of the annual value of the said house and one-half of the annual sum of 2000*l.* were Mrs. Shanks' income for the purposes of super-tax, and were properly included in the

assessment, and accordingly that the assessment ought to be confirmed. In support of this contention the following cases (amongst others) were cited: *In re Boyer's Settled Estates* (1) and *Lord Tollemache* v. *Inland Revenue Commissioners*. (2)

The Commissioners held with regard both to the annual value of the house Duneevan and to the annual sum of 2000*l*., that the proportion properly attributable to Mrs. Shanks was her income for super-tax purposes; and it being agreed between the parties that on the footing of this decision the assessment of 3406*l*. was correct in amount, the Commissioners thereupon confirmed the assessment.

Rowlatt J. said that the effect of the testator's will was to provide a house rent free for a community of two and a sum for their upkeep of the house; he therefore saw no way of dividing the assessment under Sch. A in respect of the house or of the sum of 2000*l*. so as to fix some part which ought to be treated as the income of the daughter for super-tax purposes.

The Inland Revenue Commissioners appealed.

Sir Boyd Merriman S.-G. and *R. P. Hills* for the Inland Revenue Commissioners. In determining the whole income of the respondent it was proper to include items in respect of the occupation of Duneevan and of the receipt of 2000*l*. a year by the two ladies. That is the effect of the Income Tax Act, 1918, ss. 5, 20, and Sch. A, Rule VII., r. 1. That rule shows that tax under Sch. A is to be paid by the occupier of property, and that every person who has the use of property is deemed to be an occupier. The tax is charged in respect of profits and gains arising from property, and here the two ladies were in occupation as of right rent free. If the assessment was properly made then it was for the Commissioners to decide what proportion of the total assessment ought to be treated as part of the daughter's income, and they have done so by treating half of the annual value of the property and of the 2000*l*. as her income. In order that

(1) [1916] 2 Ch. 404. (2) (1926) 11 Tax Cas. 277.

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a person may be taxable in respect of annual value of property he need not be the owner. It is the occupier who is liable, unless he can show that he paid rent, out of which the tax was deducted: *Inland Revenue Commissioners* v. *Fargus* (1); *Moore* v. *Drughorn*. (2) Apart from the fact that here there was joint occupancy by two persons, the decision in *Lord Tollemache* v. *Inland Revenue Commissioners* (3) is directly in point. It shows that the only material question is whether there was actual occupation in the year of assessment. The only reason why Rowlatt J. did not follow his earlier decision was on the ground of the occupation being joint, and any difficulty so caused has been overcome by the decision of the Commissioners fixing the portion which should be treated as part of the daughter's income; and that decision is not one that could be disturbed.

The difficulty that arises on the question whether the occupation would, if by one person only, have created a liability to tax under Sch. A is caused by certain Scottish cases. These cases were, it is suggested, based on a misunderstanding of the decision of the House of Lords in *Tennant* v. *Smith*. (4) That case had nothing to do with Sch. A. The question was whether right of residence by a bank manager on bank premises could be relied on as increasing his income under Sch. E. It was there held that it could not, as his residence on the premises was imposed upon him as a condition of his employment, so that he could not let the premises. These Scottish cases are *Inland Revenue Commissioners* v. *Wemyss* (5); *Lockhart de Robeck* v. *Inland Revenue Commissioners* (6); *Donaldson's Executors* v. *Inland Revenue Commissioners* (7); and *Miller* v. *Inland Revenue Commissioners*. (8) It is entirely erroneous to say that occupation cannot give rise to tax under Sch. A unless something in the shape of money or money's worth can be obtained in respect of this right of property. The true view

(1) (1926) 10 Tax Cas. 665.
(2) [1922] 2 K. B. 492.
(3) 11 Tax Cas. 277.
(4) [1892] A. C. 150.
(5) 8 Tax Cas. 551.
(6) 1927 S. L. T. 138; 1928 S. L. T. 222.
(7) (1927) Tax Leaflet, No. 364.
(8) 1928 S. L. T. 570.

of the law is that laid down in the dissentient judgment of Lord Morison in *Miller* v. *Inland Revenue Commissioners.* (1) It accords with what was said in *Moore* v. *Drughorn* (2) and *Lord Tollemache* v. *Inland Revenue Commissioners.* (3) All that is necessary is that the occupation should be beneficial and not at a rack rent.

Raymond Needham K.C. and *H. H. C. Graham* for the respondent. The question what right of residence will make a person liable to include the annual value of the property occupied in his total income was first considered in *M'Dougall* v. *Sutherland* (4), where it was held that the occupation of his manse by a minister of the Free Church of Scotland could not be taken into account in calculating his total income, as he is obliged to reside there; and it may be contrasted with *Corke* v. *Fry* (5), where a minister of the Established Church of Scotland is held to be in beneficial occupation of his benefice. There the manse was not vested in trustees, and it was pointed out that the minister had power to let it, though in practice that was not done. It is suggested that the test is whether the right of residence is free, so that the occupier could turn his right of enjoyment into money by sale or lease. And this is confirmed by the later Scottish cases: *Inland Revenue Commissioners* v. *Wemyss* (6); *De Robeck's Case* (7); *Miller* v. *Inland Revenue Commissioners.* (1) Apart from Rowlatt J.'s earlier decision in *Lord Tollemache's Case* (3) and the dissenting judgments of Lord Morison in *Miller* v. *Inland Revenue Commissioners* (1) all the judgments are in the respondent's favour. The Court will not interfere with a long course of judicial dicta: *Egyptian Delta Land and Investment Co.* v. *Todd* (8); *Swedish Central Ry. Co.* v. *Thompson.* (9) Here the trend of judicial authority has been in the respondent's favour for over thirty-four years. She and her mother had only the personal use of Duneevan and no right of property in it within Sch. A. They could not let or sell.

(1) 1928 S. L. T. 570.
(2) [1922] 2 K. B. 492.
(3) 11 Tax Cas. 277.
(4) (1894) 3 Tax Cas. 261.
(5) (1895) 3 Tax Cas. 335.
(6) 8 Tax Cas. 551.
(7) 1927 S. L. T. 138.
(8) (1928) 44 Times L. R. 747, 754; [1929] A. C. 1.
(9) [1925] A. C. 495.

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Nor should any distinction be drawn with the money payment of 2000*l.* and the right of residence. The money was for use in connection with the right of residence and has the same quality: *Donaldson's Case.* (1)

The right of residence of the daughter was not liable to tax under Sch. A. That is a tax in respect of the ownership of land: Income Tax Act, 1918, s. 19. Here Mrs. Shanks was not the owner, and the annual value was not therefore returnable in her total income for super-tax purposes: compare *Inland Revenue Commissioners* v. *Pakenham.* (2) A person cannot be subject to income tax in respect of a right which cannot be turned into money value. That is the view expressed in *Tennant* v. *Smith* (3) and in the several Scottish cases: *M'Dougall* v. *Sutherland* (4); *Corke* v. *Fry* (5); *Inland Revenue Commissioners* v. *Wemyss* (6); *Donaldson's Case* (1); *De Robeck's Case* (7); and *Miller's Case.* (8) Tax is assessed on the occupier of premises as a mere piece of machinery for getting in the tax easily, but for the occupier to be liable to include it in his total income he must be the owner also. Tax is not leviable in respect of a mere personal right of residence, because there is no income to tax. It is not an interest convertible into money. Further, a person with a mere personal right of residence has no property in land, and tax under Sch. A is a tax in respect of "property" on the owner.

Sir Boyd Merriman S.-G. in reply. It is not correct to say that the tax under Sch. A is a tax on "property"; it is a tax on profits and gains arising from the use of property: *London County Council* v. *Attorney-General* (9), and for the purposes of Sch. A a beneficial use of property is treated as income. The fallacy underlying the Scottish cases relied on by the respondent is that they have applied to the question of taxation under Sch. A considerations which were recognized

(1) (1927) Tax Leaflet, No. 364.
(2) [1927] 1 K. B. 594, 613.
(3) [1892] A. C. 150.
(4) 3 Tax Cas. 261.
(5) 3 Tax Cas. 335.
(6) 8 Tax Cas. 551.
(7) 1927 S. L. T. 138.
(8) 1928 S. L. T. 570, 576.
(9) [1901] A. C. 26, 35.

as material to the question of taxation under Sch. E in *Tennant* v. *Smith.* (1) Lastly, the question what proportion of the Sch. A. assessment should be included in Mrs. Shanks' income is a question for them, and Rowlatt J. has made the mistake of not realizing this.

Cur. adv. vult.

Oct. 31. LORD HANWORTH M.R. The respondent in this case is the only daughter of Charles Henry Champness, who by his will made certain provisions in favour of his widow and daughter. [His Lordship then referred to the material provisions in the will, and after stating the submissions of the parties as set out in the special case continued:] The Commissioners held "with regard both to the annual value of the house Duneevan and to the annual sum of 2000*l.* that the proportion properly attributed to the appellant is her income for super-tax purposes"; and they divided the annual value of the house and the sum of 2000*l.*, so that the respective moieties attributable to the respondent are 106*l.* 12*s.* 6*d.* and 1000*l.* All facts are for the Commissioners and not for us, and they say in the special case: "The only question for the Court is whether or not those sums form part of the appellant's total income for super-tax purposes for the year in question." I am content to treat that as the only question we have to determine.

The form of the question is important, for it could have been said that under s. 5, sub-s. 2, of the Income Tax Act, 1918, the assessment to income tax for the previous year is to be "final and conclusive in estimating total income from all sources for the purposes of super-tax for the following year"; and that we ought to see whether or not the income tax assessment included those sums. If it did, then no question could arise upon super-tax, because a final and conclusive assessment had been reached. But the question before us is raised independently of the income tax assessment, and it is claimed that the super-tax assessment must be wrong, even if the ultimate result was a readjustment and correction

(1) [1892] A. C. 150.

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of the income tax return. Both the respondent and the Crown have submitted the matter in the form stated in the special case, and we have not made inquiries as to the income tax assessments. Therefore I take the question before us to be as stated in clause 2 of the case.

The argument for the respondent is, first, that she had no property in Duneevan as a result of the right of residence given to her jointly with her mother, and, secondly, that she had no independent share in the yearly sum of 2000*l.* provided under clause 7 of the will; and the Commissioners having determined the quantum attributable to the respondent, we have to determine whether the respondent had any property or interest in Duneevan which attracted super-tax in respect of the sum of 106*l.* 12*s.* 6*d.* in regard to her occupation of the house.

The Income Tax Act, 1918, s. 1, provides: "Where any Act enacts that income tax shall be charged for any year at any rate, the tax at that rate shall be charged for that year in respect of all property, profits, or gains respectively described or comprised in the Schedules marked A, B, C, D and E, contained in the First Schedule to this Act"; and that charging section is expanded in Sch. A itself when the preliminary statement is made: "Tax under Schedule A shall be charged in respect of the property in all lands, tenements, hereditaments, and heritages in the United Kingdom, for every twenty shillings of the annual value thereof." Rule I. of the rules applicable to Sch. A, which is entitled, "General rule for estimating the annual value of lands, tenements, hereditaments or heritages," says: In the case of all lands, tenements, hereditaments or heritages capable of actual occupation, of whatever tenure, and for whatever purpose occupied or enjoyed, and of whatever value . . . . the annual value shall be understood to be:— . . . . (2.) If they are not let at a rackrent so fixed, then the rack-rent at which they are worth to be let by the year." And Rule VII. says: "(1.) Save as in this Act provided in any particular case tax under this Schedule shall be charged on and paid by the occupier for the time being. (2.) Every

person having the use of any lands or tenements shall be deemed to be the occupier thereof." Thus the meaning of the charging section is expanded in the rules, and we learn from them that the occupier is to pay for the actual occupation according to the annual value, being the rate at which the premises "are worth to be let by the year." Rule VIII. provides for the recoupment of the tax in certain cases.

The first argument presented to us is that, as there is a reference to "property" in the charging section and in the preliminary statement in Sch. A, the respondent is not liable, for she had no property in Duneevan. That argument is to my mind unsound, for it has been laid down quite clearly that what is taxed under Sch. A is income value. Thus in *London County Council* v. *Attorney-General* (1) Lord Macnaghten says: "Schedule A contains the duties chargeable for and in respect of the property in all lands, tenements and hereditaments capable of actual occupation," and then he goes on, "It is a tax on 'profits or gains' in the case of duties chargeable under Schedule A and everything coming under that Schedule—the annual value of lands capable of actual occupation as well as the earnings of railway companies and other concerns connected with land—just as much as it is in the case of the other Schedules of charge." Lord Davey says (2): "I construe the words 'profits or gains brought into charge by virtue of this Act' as including all annual income charged with the tax under any of the Schedules, and not as confined to profits charged under Sch. D," and later (3) Lord Davey says: "I am, therefore, of opinion that the words 'profits or gains' are apt words, and the words chosen by the Legislature for describing not only the taxable subjects under Sch. D, but also those comprised in Schedules A and B and the other Schedules."

It appears, therefore, that what one has to ascertain is whether or not these were profits or gains in respect of this occupation of Duneevan, and that the dominant word is not "property," the real question being whether or not there

(1) [1901] A. C. 26, 35. (2) [1901] A. C. 42.
(3) [1901] A. C. 45.

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enured to the occupier some profits or gains in respect of that occupation. An illustration of what may be a beneficial occupation and chargeable to income tax is given in *Ystradyfodwg and Pontypridd Main Sewerage Board* v. *Bensted.* (1) In that case it was found that there were profits or gains in respect of the occupation of a sewer. Lord Halsbury said: "In the first place it is clear that there is an occupation, and in the next place it is clear there is a beneficial occupation"; and if you have got those two attributes then tax is attracted. As another illustration to show that this view has always and constantly been accepted, I refer to the judgment of Warrington L.J. (as he then was) in *Moore* v. *Drughorn* (2), where, speaking of tax under Sch. A, he said: "The tax, though popularly and indeed officially spoken of as a property tax, is strictly a tax on income. It is in the words of the first paragraph of Schedule A 'charged in respect of the property in all lands, etc., for every twenty shillings of the annual value thereof.' It is a tax, not upon the rent but upon the annual value." I come therefore to the conclusion, with those authorities before me, that it cannot be said that the true test is whether or not the respondent had an independent property in this estate. She had a life interest if she called upon the trustees to allow her the personal use and occupation of Duneevan, and they were bound to accede to her demand and to allow her that occupation and enjoyment.

In a Scotch case, it has been clearly laid down that if a lady is a life rentrix then she is liable to tax in respect of the enjoyment of the property and liable in respect of all additions provided for her enjoyment, which must be taken into account as part of her income. The case which establishes that is *Donaldson's Case.* (3) In that case the trustees provided certain sums which enhanced the possession and enjoyment of the life rentrix, and in respect of those, as well as the actual occupation, the life rentrix was held chargeable under Sch. A. More than that, in the recent case of *Inland Revenue Commissioners* v. *Fargus* (4) the same principle was followed by Rowlatt J., who

(1) [1907] A. C. 264, 268.
(2) [1922] 2 K. B. 492, 497.
(3) Tax Leaflet, No. 364.
(4) 10 Tax Cas. 665.

says that "the taxpayer is rightly assessed at the value at which it stands"—that is, at which the annual value stands—"there upon the face of the earth."

I then come to consider what sort of occupation the respondent had. She had a right which the trustees were bound to respect. If she had not exercised that right, and if the mother had not exercised her right, Duneevan would have fallen into the residuary estate of the testator, and so long therefore as this right of occupation was insisted upon, the residue was depleted of a certain sum, and it would have benefited both as to capital and income by the failure to exercise that right of occupation. It is said in answer to that view that there are authorities showing that occupation does not always attract tax, and the primary case cited in support of that view is *Tennant* v. *Smith*. (1) That was a case in which it was sought to bring up the income of a bank manager above the sum of 400*l*. by including in his total income a sum which was to represent the value of his occupation of the bank premises where he was allowed to live. It appears to me that *Tennant* v. *Smith* (1) is a case which has been much misunderstood. First of all it is quite clear that the tax under Sch. A was paid in respect of the premises by the bank. This is shown in the following passage in the arguments (2): "It has been stated and truly that the bank pay income tax under Schedule A in respect of the bank premises, the dwelling-house included." That was a case in which the bank manager was assessed under Sch. E, and the attempt to enhance the bank manager's income by attributing to it certain values which belonged to the occupation of the bank premises failed because, regarding the matter as a matter of tax under Sch. E, the occupation enjoyed by the bank manager was not an occupation in his own right, but an occupation imposed on him for the purpose of enabling him to fulfil his duty to his employers. Lord Watson says (3): "His position does not differ in any respect from that of a caretaker or other servant, the nature

(1) [1892] A. C. 150; 3 Tax Cas. 158.

(2) 3 Tax Cas. 162.

(3) [1892] A. C. 150, 158.

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of whose employment requires that he shall live in his master's dwelling-house or business premises instead of occupying a separate residence of his own." While Lord Macnaghten says (1): "He is not entitled to sublet the bank house or to use it for other than bank business, and in the event of his ceasing to hold his office he is under obligation to quit the premises forthwith. Property, therefore, in the house he has none, of any sort or kind. He has the privilege of residing there. But his occupation is that of a servant, and not the less so because the bank thinks proper to provide for gentlemen in his position in their service accommodation on a liberal scale. It is clear, therefore, that the appellant is not chargeable under Schedule A in respect of the bank house, or liable to pay the duty as occupying tenant. The bank and the bank alone is chargeable and liable to pay." It appears to me that a misunderstanding of *Tennant* v. *Smith* (2) has led to the difficulties which have arisen in this case, and has caused difficulty in cases which have come before the Scottish Courts. I repeat with regard to *Tennant* v. *Smith* (2) that the effort of the taxing authorities there was to increase the income under Sch. E of the bank manager by including the value of his residence at the bank.

Two other cases have been referred to which involved different decisions. In *M'Dougall* v. *Sutherland* (3) a minister of the Free Church of Scotland claimed that the annual value of the manse occupied by him was not to be taken into account in calculating his total income, and it was held that the annual value of the manse did not form part of his income. That decision was reached on the ground that his occupation of the residence provided for him was one in respect of which he had no power of volition or choice. On the other hand in *Corke* v. *Fry* (4) the respondent was a minister of the Established Church, who claimed that the annual value of his manse was not to be taken into account; but it was held that the annual value formed part of his income, and in that case it was held that he did have a beneficial occupation

(1) [1892] A. C. 162.
(2) [1892] A. C. 150, 158.
(3) 3 Tax Cas. 261.
(4) 3 Tax Cas. 335.

of the benefice and was not in the position indicated in *Tennant* v. *Smith* (1) or in *M'Dougall* v. *Sutherland.* (2) The case being so differentiated, his occupation was held to be capable of assessment at an annual value as something which was enjoyed by him and added to his income.

The next case I wish to refer to is *Inland Revenue Commissioners* v. *Wemyss.* (3) In that case it was decided that the taxpayer was not liable in respect of the user of the family mansion which he was allowed to occupy, but care must be taken not to overlook the facts of that case. The trustees were entitled to allow Colonel Wemyss to occupy the house "so long as my said trustees shall find it expedient to retain the same in their own hands unlet," but they had power, if they were so minded, to come down at any moment to the then occupier and say: "We find it convenient now to let the premises, and we are going to do so." Colonel Wemyss was not able to call upon the trustees, as of right, to allow him to enjoy the mansion. The question whether he should be allowed to reside in the house depended entirely upon the trustees, and he had no claim which he could assert. The facts differentiate that case widely from the present one. It was there said by Lord Skerrington (4): "The trustees are, on my construction of the trust disposition and settlement, intended by the testator to have all the rights and duties of owners and occupiers as regards maintenance and upkeep and payment of public burdens so long as they elect to keep the subjects unlet and in their own hands." But even though that very precarious opportunity—for I cannot call it a right—was all that was given to Colonel Wemyss, Lord Sands found some difficulty in acceding to the decision, for he said (5): "It must, I think, be taken that there may be an 'occupier' who is primarily chargeable in respect that he has 'the use' of the property, although he is neither owner as that word is ordinarily understood nor tenant." *Inland Revenue Commissioners* v. *Wemyss* (3) therefore appears to

(1) [1892] A. C. 150, 158.
(2) 3 Tax Cas. 261.
(3) 8 Tax Cas. 551.
(4) 8 Tax Cas. 580.
(5) 8 Tax Cas. 586.

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me to offer no guiding principle which is of assistance in the present case, seeing that the trustees were here bound to give the enjoyment of Duneevan to the respondent and her mother. I now come to *De Robeck's Case.* (1) There the trustees had the right for the purpose of paying off death duties to hold in their hands the lands and estates which were ultimately to be held by the widow in life rent. In those circumstances the Lord President, Lord Clyde, said: "It was only after implement of all these provisions that the trustees were directed 'as soon as convenient after my death' to convey the estate to Lady Lockhart de Robeck. I think it would be unreasonable to disregard a prolongation of the period of trustees' administration, due to the necessity of meeting the estate duties, in determining when the 'convenient' time for conveying the estate to Lady Lockhart de Robeck had arrived; and it seems to me impossible in these circumstances to say that the delay in making over the 'ownership' of the estate to her was in any degree contrary to the intention of the settlement. If so, there is no reason to impute to her (for tax purposes) an 'ownership' which she did not, and could not, in the circumstances have." That again appears to me to follow the reasoning of *Inland Revenue Commissioners* v. *Wemyss* (2), but once more not in such a way as to give any assistance to the Court in the present case.

Then I come to the more recent decision in *Miller* v. *Inland Revenue Commissioners.* (3) Shortly put, I find myself in agreement in that case with the dissenting judgment of Lord Morison, and I do not find it possible to accept the decision which was reached by the majority of the Court. Lord Clyde says (4): "It is a fundamental, and, I think, a fatal objection to this argument that it seeks to add, for the purposes of the Income Tax Act, 1918, to the actual income which the taxpayer puts, or could (if he pleases) put, into his pocket a fictional or supposititious income, which does not reach, and could not possibly reach, that destination. The Income Tax Act nowhere defines 'income,' and it follows

(1) 1927 S. L. T. 138, 141.
(2) 8 Tax Cas. 551.
(3) 1928 S. L. T. 570.
(4) Ibid. 576.

that this word—which limits and controls the scope of the entire income tax system—must be interpreted in its plain and ordinary meaning." Those words seem to me to be in conflict with the statements made by Lord Watson and Lord Macnaghten in *London County Council* v. *Attorney-General.* (1) Again, when he deals with *Tennant* v. *Smith* (2), Lord Clyde says (3): "In *Tennant* v. *Smith* (2) the bank and not the bank agent, who occupied and used the house provided to him by the bank for residential purposes, was regarded as the true occupier." In making that statement Lord Clyde seems not to appreciate the nature of the problem decided in *Tennant* v. *Smith* (2), or to remember that *Tennant* v. *Smith* (2) was a case under Sch. E. Lord Sands in his judgment appears to me in effect to agree with the views presented by Lord Morison on the important point with which I am dealing at present. He says (4): "In my view the occupier within the meaning of the rule is the person whom the tax collector finds in the beneficial enjoyment of the property according to its nature on his own account and not as an employee or caretaker." That statement appears to me to be quite right. But I do not agree with his view (5) that "It is a common fallacy that rates and taxes are imposed upon and paid by property. But, whatever the language employed, rates and taxes are imposed upon and payable by, not property, but persons." It is true that the payment has to be by persons, but it arises out of the profits and gains which accrue to those persons, whether from the enjoyment of real property, or from commerce, trade or business.

Lord Morison to my mind calls attention to the rule which has been established by *London County Council* v. *Attorney-General* (1) and other cases to which I have referred, when he says (6): "During each year of its existence I am convinced that there were many instances where property tax has been charged, levied and paid by liferenters *qua* occupiers of heritable property, wholly irrespective of whether

(1) [1901] A. C. 26.
(2) [1892] A. C. 150.
(3) 1928 S. L. T. 579.
(4) 1928 S. L. T. 581.
(5) Ibid. 582.
(6) Ibid. 590.

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they could convert their occupation into a money return or not." In my view that is right; and it appears to me that the majority of the Court in that case misread *Tennant* v. *Smith* (1), and overlooked the important consideration that although the charge is in respect of property, what it is intended to reach are the profits or gains which accrue to the occupier under Sch. A, and that the measure of the value does not depend upon how the right of property can be exercised, but on whether or not there is an enjoyment which enures to the benefit of, and thus to the profits and gains of, the person on whom the tax is charged.

Mr. Needham, in concluding his argument, summarized his propositions, and his first proposition was: Unless an occupier has ownership in land he is not liable to enter anything in the return of his income. In my opinion that proposition runs counter to the authorities which I have quoted and to the words of Lord Macnaghten, Lord Davey and Lord Watson. Secondly, Mr. Needham said that: The mere right of residence was not occupation, and Mrs. Shanks was not an owner. There may be an occupation such as that of a caretaker or of a bank manager, but there may also be an occupation which can be estimated as profit or gain to the person who enjoys it; and thirdly, Mr. Needham said that there was no specific charge to super-tax in respect of an assessment under Sch. A. That to my mind appears to overlook the fact that super tax is charged in respect of the return or assessment to income tax, and every one knows that income tax may be charged, where it is properly attracted, in respect of occupation of lands under Sch. A.

I come therefore to the conclusion first, that this lady under her father's will had a right of use, occupation and enjoyment, which has been estimated by the Commissioners at a value of 106*l.* 12*s.* 6*d.*; secondly, that she had a right in part of the income of 2000*l.*, which the Commissioners have estimated at 1000*l.*; and in respect of both of those items I think that the view which they took was right. I therefore find myself unfortunately unable to agree with

(1) [1892] A. C. 150.

Rowlatt J., but I think that the view which he reached was rather independent of the case as presented by the Commissioners, and that he did not give full weight to their findings of fact, which, on the question of amount, are conclusive; and I think it was possible to quantify the independent rights of the mother and daughter as the Commissioners have done.

For those reasons I come to the conclusion that the claim against the respondent to insert those items in her super-tax return is right, and that the appeal must therefore be allowed.

GREER L.J. I am of the same opinion. The respondent is the daughter of Mr. Champness, and, with her mother, occupied during the year of tax a house and grounds known as Duneevan, under the terms of his will. It is not necessary for me to read again the terms of clause 7 of his will, but I call attention to two consequences of the words used by the testator. The first is that the right of occupation, the right of exclusive possession, is given to the widow and the daughter, so long as they personally reside on the premises; and the second, that the concluding words of the clause indicate that the testator intended to give possession to those two ladies in such a way that they would be liable for rates and taxes, and that he considered it right in those circumstances to provide them with money so long as they were in occupation of the premises for paying the rates and taxes for which as occupiers they would be liable in law.

Two points have been made on behalf of the respondent in this case: The first is that if there were only one person in occupation under these terms of the will, that person would not be liable to be assessed to income tax or super-tax in relation to that occupation. The second point is that in any case it makes a difference, as the learned judge has found, that there are two persons given the right of occupation, and no indication in the will as to what their separate shares are to be.

With regard to the first point, I suppose, if it be admissible to use in relation to a taxing Act an argument derived from

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common sense and ordinary experience, that every one would expect the Act to levy tax on the income of a person in enjoyment of income, whether that income was derived from the gains or profits of trade or from the occupation of premises having an annual value; and I cannot for myself read the Income Tax Act, 1918, ss. 1, 19, 20 and 27, and the first words of Sch. A, as throwing any doubt upon that common sense conclusion. The proviso to s. 20 seems to make it clear that the profits intended to be taxed are the profits arising from the occupation of the land, and not the profits arising to the owner of the land in the strict sense of the word. The section is dealing with the shares of joint owners and how they are to be dealt with when allowances are being claimed. The proviso says: "Profits arising from the occupation of lands shall not be separately charged if the lands are let or underlet without the lessor relinquishing the possession thereof or if the lessee is not exclusively in the possession and occupation of the lands," indicating to my mind that if any person is in exclusive occupation of the lands, then that person is the person upon whom the charge is made.

But I also place considerable reliance on the words used in *London County Council* v. *Attorney-General.* (1) Lord Macnaghten in his speech uses these words: "Income tax, if I may be pardoned for saying so, is a tax on income. It is not meant to be a tax on anything else. It is one tax, and not a collection of taxes essentially distinct. There is no difference in kind between the duties of income tax assessed under Schedule D and those assessed under Schedule A or any of the other Schedules of charges. One man has fixed property, another lives by his wits; each contributes to the tax if his income is above the prescribed limit. The standard of assessment varies according to the nature of the source from which taxable income is derived. That is all. Schedule A contains the duties chargeable for and in respect of the property in all lands, tenements, and hereditaments capable of actual occupation. There the standard is annual value. It is difficult to see what other standard could have

(1) [1901] A. C. 26, 35.

been adopted as a general rule. But there again, if the subject of charge be lands let at rack rent, the annual value is 'understood to be the rent by the year at which the same are let.' In every case the tax is a tax on income, whatever may be the standard by which the income is measured"; and if regard may be had to what happens in every day life in London, one knows perfectly well that the annual value of premises in the occupation of a tenant may be partly income of the tenant, partly income of his landlord, and partly the income of his landlord's mortgagee; and each of these persons is chargeable to tax for that which is part of his income in respect either of income tax or super-tax. If the tenant is tenant at a peppercorn rent, the whole of the annual value is the income of the tenant; if on the other hand the tenant is tenant at a rack rent, the whole of the annual value is the income of the landlord subject to any right he may have to deduct a portion of it from his mortgagee. It would be odd indeed if occupiers like the two ladies in this case were to escape liability to tax when the owner has not the right to exact even a peppercorn rent from them, whereas they would be liable for tax if the owner were entitled to exact a peppercorn, or a nominal rent of any sort or kind. Undoubtedly, if there had been only one occupier in this case, Rowlatt J. would have followed his own decision in *Lord Tollemache* v. *Inland Revenue Commissioners* (1), and would have held the annual value of the property to be part of the income of the persons in occupation, but the contrary view has been taken in a number of Scottish cases to which my Lord has referred. The effect of the Scottish decisions is that the majority of the senators of the College of Justice in Scotland came to the conclusion that a person enjoying the personal use of property, which had an annual value, was not taxable unless he were in a position to make money out of his occupation, either by assigning or subletting it. I think it is impossible to read those cases without coming to the conclusion that that is the law which has been laid down by the Court of Session in Scotland as applicable to facts similar to the facts in this case, and that if this case

(1) 11 Tax Cas. 277.

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had come before the Court of Session in Scotland they would have been bound to decide that these ladies were not taxable in respect of the annual value of these premises. But the weight of those authorities is very much weakened in my mind by the fact that they are majority decisions, and that two of the learned judges, whose judgments are to my mind convincing, took the opposite view, while Lord Sands, after having reluctantly concurred in the decision in *Inland Revenue Commissioners* v. *Wemyss* (1), felt that in *Miller* v. *Inland Revenue Commissioners* (2) he was bound to follow that case, although it did not accord with his own opinion, as appears by the judgment which he delivered. Personally I agree with the reasoning of Lord Morison in *Lady Miller's Case* (2), and notwithstanding the great authority of the other judgments—and one ought, especially in tax cases, which apply equally in Scotland and in England, to pay the greatest deference to the decisions in the Scottish Courts —still I think in the circumstances we must exercise our own judgment in the matter, and as we disagree with the decisions of the Scottish judges, come to the conclusion to which we have come in this case.

The only other point necessary for consideration is whether it makes any difference, as the learned judge below has found, that in this case there are two ladies occupying the premises and two ladies to whom the relief of 2000*l.* is given for the purpose of paying rates, taxes and outgoings. It cannot be that because two persons are beneficial occupiers they both escape tax. The question is mainly one of fact. There might be cases where the right to live on premises was given to a large number of persons, in which it would not be possible to say that those persons were occupiers and in possession of the house. But that is not the present case. Here two persons are occupying as of right, and I think that it was for the Commissioners to say how much of the annual value of the house and how much of the sum of 2000*l.* was to be treated as the income of the one and how much as the income of the other. They have decided

(1) 8 Tax Cas. 551. (2) 1928 S. L. T. 570.

the question in the way in which anybody else to whom it was left would have decided it, by holding that in each case half must be treated as the income of each lady. We certainly do not feel disposed to differ from them in that respect.

I have only one further observation to make. An argument has been founded on the use in some sections of the Act of the word "property," to the effect that a person is not liable to tax under Sch. A unless he takes the property in the land. I think the answer to that argument is that the Act of Parliament as a whole uses the word "property" not in any technical sense, but as including any right of occupation which gives the occupier the benefit of the annual value.

For those reasons and for other reasons which have been given by my Lord, I come to the conclusion that Rowlatt J.'s judgment cannot stand, and that this appeal must be allowed with costs.

RUSSELL L.J. I am in agreement with the judgments which have been delivered, but inasmuch as we are reversing the judgment of the learned judge in the Court below, I desire to state shortly my own reasons in my own language.

I propose to deal with the case in the first instance upon the footing that Mrs. Shanks, the testator's daughter, was the only beneficiary under clauses 7 and 8 of the testator's will. If that were the fact, two points would arise for consideration. The first is in regard to the sum of 2000*l.* a year. As regards that we have really had submitted to us no argument at all. Indeed, it would be in my opinion too plain for argument that the 2000*l.* was nothing more or less than an addition to the lady's income, which she was under no obligation to apply in any particular way.

The second point which arises is in regard to the net annual value under Sch. A of the house Duneevan. As regards that the position is of course not quite so simple. The respondent's argument, as I appreciate it, was that tax under Sch. A is charged in respect of property in lands, and that Mrs. Shanks' right to Duneevan under the will was a purely

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personal right, which she could not turn into money by assigning or sub-letting, and that accordingly she was not in the true sense of the words the owner of the property; and it was said that unless Mrs. Shanks, as the occupier, had also the full ownership of the land, she was not obliged to include anything in respect of that land in a return of her total income. In my opinion upon the whole scheme of the Income Tax Act that argument is not sound. During the year which is here in question Mrs. Shanks and nobody else (upon the hypothesis with which I am now dealing) enjoyed the house, Mrs. Shanks and nobody else enjoyed the property in the house, and enjoyed the annual value of the house, and she enjoyed it as of right. She is the person under Sch. A to the Income Tax Acts, No. VII., rr. 1 and 2, upon whom and by whom income tax is charged and paid. The Rules under No. VIII. make provision for recoupment in certain cases to the occupier who has paid the tax. Where such recoupment is not available or is incomplete it is because the occupier is the person exclusively or partially in enjoyment of the annual value. According to the provisions of the Income Tax Act, a person in returning his total income from all sources ought in my opinion to include as part thereof something in respect of land the annual value of which he has enjoyed during the year in question. That forms part of his profits and gains for that year. In the cases now under consideration Mrs. Shanks should, if she were the only beneficiary under clauses 7 and 8 of the will, include the whole annual value of 213*l.* 5*s.*

It was said, however, that there were authorities which had decided to the contrary, and in particular the very recent case of *Miller* v. *Inland Revenue Commissioners* (1) was relied upon. That decision appears to me to rest in part upon *Inland Revenue Commissioners* v. *Wemyss* (2) and in part upon *Tennant* v. *Smith.* (3) As regards *Wemyss' Case* (2) that decision must, I think, depend only on its own very special facts, and affords no assistance to us in the present discussion.

(1) 1928 S. L. T. 570. (2) 8 Tax Cas. 551.
(3) [1892] A. C. 150.

In so far as the decision in *Miller's Case* (1) purports to rest on *Tennant* v. *Smith* (2), it seems to me to rest upon an erroneous view of that case. *Tennant* v. *Smith* (2), as I read it, did not decide that a return of total income should not include anything in respect of free occupation of a house during the year; it decided only that the bank manager's occupation in that case was not assessable under Schedules D or E. Lord Macnaghten in his speech says (3): "The first point for consideration is what is the meaning of the expression 'total income from all sources.' It certainly means more than income properly so described—it includes more than 'profits and gains' chargeable under the last three schedules of charge. It includes the annual value of property chargeable under Schedule A." Speaking for myself, I prefer the views and reasoning of Lord Morison in his dissenting judgment in *Miller's Case* (1) to the views and reasoning of the majority of the Court.

Down to this point I have dealt with the case upon the hypothesis that Mrs. Shanks was the sole beneficiary under clauses 7 and 8, and I hold that upon that footing she must include in her total income for the year in question both the 2000*l.* and the annual value of Duneevan. In point of fact her mother under clauses 7 and 8 of the will was entitled to, and did during the year in question, enjoy the occupation of the house, and received the 2000*l.* with her daughter. Does this make any difference to Mrs. Shanks' position in regard to super-tax, except as to the amount to be included in the return of total income? I think not. Rowlatt J. says that he cannot assign any particular share or interest to either beneficiary. The Commissioners have charged Mrs. Shanks with a moiety of each item. This question of the proportion properly attributable to Mrs. Shanks seems to be a question for the Commissioners, whose conclusion we cannot disturb, even if we wished to do so—not that I wish to disturb it. For myself, unless very clear evidence were adduced to show that in fact the two benefits had been shared unequally, I should

(1) 1928 S. L. T. 570. (2) [1892] A. C. 150.
(3) [1892] A. C. 161.

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conclude that a moiety of each item was the proper proportion to attribute to Mrs. Shanks.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Downer & Lewis.*

H. C. G.

1928 *Nov.* 21.

LENG (SIR W. C.) AND COMPANY ("SHEFFIELD TELEGRAPH"), LIMITED *v.* SILLITOE.

Gaming—Betting—Football—Publication of coupon of ready money football betting business—Coupon contained in newspaper—Prizes for forecasting winning teams—Competitors limited to one coupon from each issue of newspaper—Newspaper bought by some persons wholly or partly for sake of coupon—Ready Money Football Betting Act, 1920 (10 & 11 *Geo.* 5, *c.* 52), *s.* 1.

The appellants were the owners and publishers of three newspapers, one of which was a well-known daily newspaper with a substantial circulation and containing all the general news usually found in a high-class daily newspaper. During the football season each copy of the three newspapers contained a coupon by which the public were invited to forecast the results of certain matches, pecuniary prizes being offered for the most correct forecasts. No competitor could send in more than one coupon from one and the same issue of each of the three newspapers. The competition, which led to large numbers of coupons being received by the appellants, was conducted at a substantial cost to maintain or increase the circulation of the newspapers and it had that effect. Justices before whom the appellants were summoned on a charge of having published in their daily newspaper the coupon of a ready money betting business contrary to the Ready Money Football Betting Act, 1920, found as a fact that on the date specified in the charge some persons bought the newspaper solely, and that other persons bought it partly, to obtain the coupon and so to acquire the chance or possibility of winning a prize:—

Held, that, it being unnecessary to prove that the vast majority of the purchasers of the newspaper had bought it for the coupon, or that the substantial object of the newspaper was to sell the coupon, there were materials on which the justices could properly convict the appellants of the offence charged against them.

Suttle v. *Cresswell* [1926] 1 K. B. 264 explained.

Turf Publishers, Ld. v. *Davies* [1927] W. N. 190 applied.

CASE stated by justices.

At a court of summary jurisdiction sitting at Sheffield on July 4, 1928, an information was preferred by the respondent, Percy Joseph Sillitoe, chief constable of the city of Sheffield,

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LENG (SIR W. C.) & CO. ("SHEFFIELD TELEGRAPH") v. SILLITOE.

under the Ready Money Football Betting Act, 1920, against the appellants, Sir W. C. Leng & Co. ("Sheffield Telegraph"), Ld., for that they on March 14, 1928, at the city of Sheffield unlawfully did in the "Sheffield Daily Telegraph" publish a coupon of a ready money football betting business carried on by them at Sheffield contrary to the said Act. (1)

On the hearing of the information it was proved or admitted :—

(*a*) That the appellants, a company duly incorporated under the Companies Acts, were the owners and publishers of the following newspapers :—the "Sheffield Daily Telegraph," published every morning except Sundays, at the price of one penny ; the "Yorkshire Telegraph and Star," published every afternoon except Sundays, also at the price of one penny ; and the "Sports Special" ("The Green Un"), published every Saturday at the price of three halfpence.

(*b*) The "Sheffield Daily Telegraph" was a well-known daily newspaper of a high-class character, with an average circulation of 60,000 copies a day. It contained all the general news usually found in a high-class daily newspaper.

(*c*) During the football season of 1926–1927 a competition, in respect of which 7000*l.* was paid, had been conducted by the appellants weekly and continuously on the following lines :—In every issue of the three newspapers published by them there appeared a coupon setting out the names of a number of football teams, and the public were invited to forecast which team would win (or draw) each of the twelve matches set out in the coupon, the person who most nearly got the correct results receiving at the end of the week a

(1) Ready Money Football Betting Act, 1920, s. 1 : "Any person who in the United Kingdom writes, prints, publishes, or knowingly circulates any advertisement, circular, or coupon of any ready money football betting business, whether such business is carried on in the United Kingdom or elsewhere, or who knowingly causes or procures . . . . any of those things to be done . . . . shall be liable on summary conviction to a fine . . . . or . . . . imprisonment."

Sect. 2 : "'Ready money football betting business' shall mean any business or agency for the making of ready money bets or wagers, or for the receipt of any money or valuable thing as the consideration for a bet or wager in connection with any football game."

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prize of 200*l.* A member of the public was permitted to send in as many coupons as he liked.

(*d*) On August 18, 1927, the competition was started again under rules which had been amended in accordance with legal advice and which precluded any competitor from sending in more than one coupon from one and the same issue of each of the three newspapers owned by the appellants.

(*e*) Football competitions were conducted each week during the ensuing football season, or for forty weeks. Up to January 12, 1928, a prize of 200*l.* was offered weekly for forecasting most correctly the results of twelve specified football matches. On and after that date a prize of 1000*l.* was offered every week to the competitor who gave the exact correct results of twenty-four football matches selected by him out of forty-four matches. If, as always happened, no competitor won this prize of 1000*l.*, the usual weekly prize of 200*l.* was awarded to the competitor who was most nearly correct. During the whole of the football season the competitions were "boomed" by the appellants in the "Sheffield Daily Telegraph" and their associated newspapers.

(*f*) The prosecution and conviction were based on the coupon appearing in the issue of the "Sheffield Daily Telegraph" for March 14, 1928, at which date the rules referred to in para. (*d*) were still applicable. A copy of the issue was purchased by a police officer for cash at the head office of the appellants, and it contained the coupon alleged by the prosecution to be a coupon of a ready money football betting business carried on by the appellants at Sheffield.

(*g*) The coupons in voucher (i.e., complimentary) copies of the newspapers were mutilated or cancelled so that they could not be used for the competitions.

(*h*) Every competitor was required to write his name on the envelope containing his coupon or coupons. Only the envelopes of competitors who had claimed that they were successful were opened.

(*i*) A box with a slot in it, and having on it a notice "'Sheffield Telegraph' Football Competition Coupon Box,"

was habitually placed outside the main entrance to the appellants' offices and adjoining the public pavement in High Street, Sheffield. More than forty other similar boxes were provided in other places at Sheffield and about forty at places outside Sheffield where the "Sheffield Daily Telegraph" circulated. These boxes were intended for the receipt of envelopes containing the football competition coupons.

(*j*) The envelopes containing coupons were very numerous. During certain hours on March 14, 15 and 16, 1928, 17,000 envelopes were deposited in the High Street, Sheffield, box alone, and in four boxes elsewhere the envelopes averaged 1000 per box. Four or five sacks of envelopes in connection with which no claims had been made, and which had, therefore, not been opened, were destroyed each week.

(*k*) To cope with work arising from the football competition during the forty weeks it lasted the appellants had a special competition department consisting of ten girls, whom it took about three days to go through the envelopes and the coupons in respect of which claims had been made.

(*l*) The competition was not limited to purchasers of the newspaper. The finder of an abandoned newspaper for which some other person had paid could compete.

(*m*) Copies of the newspaper could be bought for cash at the head office of the appellants. The ordinary method of distribution, apart from street newspaper boys, about whom no evidence was given, was through newsagents, some of whom paid cash at the office daily, when they called for their supplies, but the great majority of whom had the newspapers delivered on credit terms and paid weekly or monthly for them.

(*n*) The circulation of the "Sheffield Daily Telegraph" was fairly constant, but it went up abnormally for special events. When the competition ceased in 1927 the circulation dropped 791 copies a day. When the competition restarted there was a rise of about 5000 copies a week.

(*o*) The competition was conducted as a commercial undertaking for profit, with three objects in view—(1.) to interest the readers of the newspaper; (2.) to keep up, or to increase,

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the circulation of the newspaper; and (3.) to meet the competition of other newspapers which conducted similar competitions. The circulation was of importance to the appellants, as the number of advertisements and the price to be obtained therefrom might decrease if the circulation went down. Advertisers were supplied from time to time with certificates of the number of the net sales of the newspaper.

(*p*) The competition was run at a cost of over 8000*l.* a year to increase, or to prevent a decrease in, the circulation and it had that effect.

(*q*) The justices found as a fact that some persons bought the newspaper solely, and that others bought it partly, to obtain the coupons and thereby to acquire the chance or possibility of winning a prize of 200*l.* or 1000*l.* They also found that there was some relation between the pennies paid for some of the sold copies of the newspaper and the coupons printed in them.

(*r*) A calculation was laid before the justices which assumed that twenty-four matches had been selected from the forty-four given and showed that it would be necessary for a competitor to send in 282,429,536,481 coupons before he could be sure of sending in a coupon giving twenty-four correct results. Without vouching for or accepting the accuracy of that calculation, the justices found that the number of coupons necessary to ensure success was so large that the winning of a prize by forecasting the exact results, or by being nearest to the exact results, was substantially, or in the main, by chance.

(*s*) The chances of the competition were not alike favourable to all the competitors or players, including among them the appellants, by whom the competition or game was managed, and against whom the competitors played.

The justices were of opinion that the appellants had published a coupon of a ready money football betting business within ss. 1 and 2 of the Ready Money Football Betting Act, 1920, and they, therefore, convicted the appellants and fined them 5*l.*

The appellants appealed.

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Bevan K.C. (*Cassels K.C.* and *Theobald Mathew* with him) for the appellants. There was no evidence to support the conclusions of the justices who were not entitled, without affirmative evidence, to find that some persons bought the newspaper wholly to obtain coupons and that others bought it partly for that purpose. The coupons formed only one among a number of attractions offered by the newspaper, and it is impossible, without affirmative evidence, to say that any one part of a newspaper represents a certain proportion of its price. Prima facie the consideration for which the purchaser of a newspaper pays his money is the newspaper itself, and there was no evidence before the justices which entitled them to find that the price of the newspaper in the present case was paid to get the benefit of the coupon: per Lord Alverstone C.J. in *Reg.* v. *Stoddart.* (1) The question which has to be considered is: What is the substantial business carried on by the appellants? And the answer to that question is that it is the business of newspaper production. On that ground the present case is distinguishable from *Suttle* v. *Cresswell* (2) and *Turf Publishers, Ld.* v. *Davies* (3), where the newspapers containing the coupons complained of were mere vehicles, brought into existence ad hoc, for drawing the attention of the public to the coupons. In *Suttle* v. *Cresswell* (2) the justices specifically found that "the vast majority of the purchasers of the 'Premier Sporting Times' [the newspaper there in question] purchased it for the football coupon." Here there could be no such finding. Sect. 2 of the Act of 1920 contemplates a "business or agency" set up for the substantial purpose of making ready money bets on football matches. In *Turf Publishers, Ld.* v. *Davies* (3) the justices found that the "Racing and Football Winner" [the newspaper there in question] contained no general news and had no attraction for the subscriber except that afforded by the football coupon which, accompanied by certain "tips" and forecasts, was contained in each number.

(1) [1901] 1 K. B. 177, 184. See [1926] 1 K. B. 267.
(2) [1926] 1 K. B. 264.
(3) [1927] W. N. 190.

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Montgomery K.C. (*Paley Scott* with him) for the respondent. It was unnecessary for the respondent to satisfy the justices that any person had bought the newspaper solely to obtain the coupon. It was sufficient to show that some persons had bought it partly for that purpose. That that was so appeared from the evidence that the circulation of the newspaper increased when the competition started and decreased when it ceased, that one of the objects of the competition was to maintain or to increase the circulation of the newspaper, that the competition had been widely advertised and that its conduct amounted to a substantial business.

[He was stopped.]

Bevan K.C. replied.

LORD HEWART C.J. The appellants were convicted under the Ready Money Football Betting Act, 1920, which is "an Act to prevent the writing, printing, publishing, or circulating in the United Kingdom of advertisements, circulars, or coupons of any ready money football betting business." It has been contended that there was no material on which the justices could come to the conclusion to which they did.

It is clear from the case stated that large numbers of coupons were sent to the appellants by competitors, and that so substantial was the business connected with the competition that the appellants had to organise and maintain a special competition department at a substantial cost. It is also found that the competition was conducted at a cost of 8000*l.* a year to secure an increase, or, at least to prevent a decline, in the circulation of the newspaper and that it had that effect. From the evidence which was before them the justices drew the inference that some persons bought the newspaper solely to obtain coupons and that other persons bought it partly to obtain coupons and so to acquire a chance or possibility of winning 200*l.* or 1000*l.*

Our attention has been directed to *Suttle* v. *Cresswell*. (1) It is important that that decision should not be treated as if it applied only to cases where exactly the same facts are

(1) [1926] 1 K. B. 264.

repeated. In *Suttle* v. *Cresswell* (1), undoubtedly, the justices found as a fact that the vast majority of the purchasers of the newspaper in question there bought it for the football coupon, but, as was clearly pointed out in *Turf Publishers, Ld.* v. *Davies* (2), that finding was not in the least necessary for the decision. What is necessary for a conviction under the Act is that the defendant should be shown to be carrying on a ready money football betting business within the definition in s. 2 of the Act. In my opinion, it is quite immaterial that a person who is charged with carrying on such a business can show that he is also carrying on another business, however well established and well known it may be. If he annexes to an existing business a business which comes within the statute he is liable to the penalties provided by s. 1. And, to appreciate the relation between the printer or publisher and his clients, it is not necessary to make a guess or to strike an average. What has to be examined is the nature of the transaction which takes place between the printer or publisher and the individual purchaser of the thing published.

There were overwhelming materials before the justices in the present case to entitle them to come to the conclusion which they have set out. It may well be that the facts which they have found also show that an offence has been committed by the appellants under the law relating to lotteries, but that matter does not at present arise.

AVORY J. I am of the same opinion. I think that in this case there were ample facts to justify the justices in drawing the inference that some persons, at all events, bought this newspaper partly to obtain the coupons which it contained and so to acquire a possibility of winning the prizes that were offered. It is not necessary, for the conviction of the appellants to stand, that the evidence should be such that the inference is necessarily drawn from it that some persons bought the newspaper solely to obtain the coupons. In *Turf Publishers,*

(1) [1926] 1 K. B. 264. (2) [1927] W. N. 190.

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AVORY J.

Ld. v. *Davies* (1) Lord Hewart C.J. said: "It is said that a great many persons may have bought this newspaper without reference to this scheme of ready money betting. That may be, although, so far as the mere numbers in the case are concerned, we are expressly told that the competitors—that is to say, the living individuals who competed—were 15,000 to 20,000 and that the number of the copies of the newspaper sold was from 60,000 to 80,000. If, therefore, each competitor bought on an average four copies—in other words, if he risked the sum of 8*d.*—the whole circulation of the newspaper is accounted for. But I do not think that it is at all necessary to apply that test. Reference has been made to *Suttle* v. *Cresswell.* (2) In that case, it is true, the justices found as a fact that the vast majority of the purchasers of the sheet bought it for the football coupon, but the expression 'vast majority' was not in the least necessary for the decision of the case. In giving judgment in that case I said (3): 'Here this small pamphlet was sold at sixpence, and the justices were of opinion, as they could not fail to be, that purchasers bought it for the sake of the coupon.' That means, not necessarily all, or the vast majority of, the purchasers, but that in fact purchasers had bought it with that object. . . . . I have no doubt that the justices had ample materials to justify the conclusion at which they arrived"—namely, to convict. In other words, evidence that some of the purchasers of the newspapers bought it for the sake of the coupon is sufficient to bring the case within the statute. In *Turf Publishers, Ld.* v. *Davies* (1) Shearman J. said: "It is obviously not necessary, on the words of the statute, to prove that the newspaper complained of is a coupon and nothing else. I am quite willing to accept the argument that there is a good deal in this newspaper, which is called the 'Racing and Football Winner,' which may appeal to other classes of the community."

Turf Publishers, Ld. v. *Davies* (1) appears to me to be a direct decision that, to constitute an offence under the statute,

(1) [1927] W. N. 190. [The learned judge's citations are from a full shorthand note.]

(2) [1926] 1 K. B. 264.

(3) [1926] 1 K. B. 264, 267.

it is not necessary that there should be affirmative evidence that persons have bought a newspaper for the sake of the coupon. Nor can I see any ground for saying that it must be shown that the substantial object of the newspaper is to sell the coupons. In any business there may be two substantial objects. A newspaper proprietor may have as one of the objects of his business the sale of his newspaper, and, at the same time, the other object of making ready money bets on contingencies relating to football.

I agree that the justices in the present case were quite entitled to convict the appellants on the evidence which was before them.

ACTON J. I agree.

Appeal dismissed.

Solicitors for appellants: *Theodore Goddard & Co.*

Solicitors for respondent: *Rollit, Sons & Haydon, for Sir William Hart, Sheffield.*

G. F. L. B.

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Dec. 19.

PLATMAN *v.* FROHMAN.

Landlord and Tenant—Rent Restriction—Standard Rent—Apportionmen "necessary" to determine—Burden of Proof of Necessity—Evidence by Tenant of Rooms of Letting of whole House on August 3, 1914—*Shifting of Onus to Landlord—Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-ss.* 1 (*a*), 3.

The tenant of part of a dwelling-house to which the Rent Restriction Acts applied proved, on an application by him for an apportionment of the rent of the whole house to determine the standard rent of the rooms occupied by him, that the whole house was let on August 3, 1914:—

Held, that he had established a prima facie case of necessity for an apportionment and the onus was then cast on the landlord to show that the rooms occupied by the tenant were let as a separate dwelling-house on August 3, 1914, and so had a standard rent of their own, an apportionment of the rent of the whole house being thus rendered unnecessary.

APPEAL from Bow County Court.

In June, 1928, the appellant, Morris Frohman (hereinafter called "the landlord"), was the tenant of a house known as 548, Mile End Road, London, E. 3, three rooms of which he had sub-let to the respondent, Marks Platman (hereinafter called "the tenant"), at a rent of 1*l.* a week. The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, therefore applied to the rooms occupied by the tenant. After a request in writing by the tenant to the landlord for a statement, under s. 11 of the Act of 1920, of the standard rent of the three rooms occupied by the tenant, and a statement supplied by the landlord under that section, the tenant applied to the county court, under s. 12, sub-s. 3 (1), of the

(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 1 (*a*): "The expression 'standard rent' means the rent at which the dwelling-house was let on August 3, 1914. . . . ."

Sub-s. 2: "This Act shall apply to a house or a part of a house let as a separate dwelling, where either the annual amount of the standard rent or the rateable value does not exceed—(*a*) in the metropolitan police district . . . . 105*l*. . . . . "

Sub-s. 3: "Where, for the purpose of determining the standard rent . . . . of any dwelling-house to which this Act applies, it is necessary to apportion the rent at the date in relation to which the standard rent is to be fixed, ... the county court may, on application by either party, make such apportionment as seems just. . . . ."

Act, for an apportionment of the rent of the whole house to determine the standard rent of the rooms occupied by him.

At the hearing before the registrar the tenant called evidence to prove that on August 3, 1914, the whole house was let to the landlord at a rent of 70*l.* a year. Counsel for the landlord then submitted that it was for the tenant to prove that an apportionment was "necessary" within s. 12, sub-s. 3, and that, to do so, he must show that on August 3, 1914, the rooms occupied by him were not let separately so as to acquire a standard rent of their own. Counsel for the tenant submitted that the tenant proved a prima facie case of necessity for an apportionment when he showed that the whole house was let on August 3, 1914, but the registrar declined to make an apportionment.

The tenant appealed to the judge, who held that, on the evidence adduced before the registrar, the tenant had discharged the onus which was on him and had established a prima facie case. The judge referred the matter back to the registrar to make an apportionment and to determine the standard rent of the tenant's rooms. The registrar determined the standard rent at 6*s.* 6*d.* a week.

The landlord appealed.

Garland for the landlord. The county court judge was wrong. Under s. 12, sub-s. 3, of the Act of 1920, the burden is on the tenant to prove that an apportionment is necessary: per Salter J. in *Rex* v. *Marylebone County Court Judge.* (1) To discharge that burden he must prove the absence of circumstances which would render an apportionment unnecessary. If the rooms occupied by the tenant were let as a separate dwelling-house on August 3, 1914, they would have a standard rent of their own: see s. 12, sub-s. 2, of the Act of 1920; and an apportionment would be unnecessary. Therefore the tenant, to obtain an apportionment, must prove that his rooms were not let as a separate dwelling-house on August 3, 1914. That that is so appears from the dictum of Atkin L.J., in *Sinclair* v. *Powell* (2), when he

(1) [1923] 1 K. B. 365, 368. (2) [1922] 1 K. B. 393, 407.

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said: "If the part of a house was not let as a separate dwelling in August, 1914, you may show that substantially in the form in which it now is it existed and was let as part of a whole house or a larger tenement in August, 1914, and can get the rent apportioned"; and that of Salter J., in *Joy* v. *Eppner* (1), where he said that the tenant was entitled to have the standard rent of his dwelling-house fixed by apportionment if he could show that apportionment was necessary and that, therefore, before proceeding to apportion, the county court judge must consider whether the dwelling-house was let on August 3, 1914, in which case the rent at which it was then let would be the standard rent. In considering whether an apportionment should be made, the county court judge must regard the physical identity of the dwelling-house: *Marchbank* v. *Campbell.* (2)

Glyn-Jones for the tenant. The county court judge was right. When the tenant proved that the whole house was let on August 3, 1914, he proved that every part of it was let on that date: per Greer L.J., in *Lloyd* v. *Cook* (3), where he referred to *Sutton* v. *Begley* (4), a decision to that effect which Shearman J., in *Joy* v. *Eppner* (5), said finally settled the law of apportionment. The tenant, therefore, proved that the rooms occupied by him were let on August 3, 1914, and that they had a standard rent which, in the absence of evidence to the contrary, must be determined by the apportionment of the rent of the whole house. There was a standard rent of the house which included the tenant's rooms, and an apportionment of the rent of the whole house was, therefore, necessary to determine the standard rent of the rooms.

Garland replied.

SHEARMAN J. In my judgment this appeal must be dismissed, but I express my opinion with great hesitation, as I often do on points under the Rent Restriction Acts. It

(1) [1925] 1 K. B. 362, 369.
(2) [1923] 1 K. B. 245.
(3) [1929] 1 K. B. 103, 134.
(4) [1923] 2 K. B. 694.
(5) [1925] 1 K. B. 362, 366.

has been argued with great force that the county court cannot apportion rent unless it is "necessary" to do so to determine the standard rent of part of comprising premises; that it is not necessary to apportion rent where the dwelling-house the standard rent of which it is sought to determine was let on August 3, 1914, as a separate dwelling-house and as such possesses a standard rent of its own under s. 12, sub-s. 1 (*a*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920; that the onus of proving necessity to apportion is on the tenant, and that that onus was not discharged by the tenant in the present case. In other words, the landlord has contended that the tenant must show that the rooms to determine the standard rent of which he would have the rent of the whole house apportioned were not let as a separate dwelling-house on August 3, 1914.

Clearly it would not be necessary to apportion the rent of the whole house if the rooms occupied by the tenant were shown to have been let separately on August 3, 1914. Both sides plead hardship and difficulty. The landlord says that it is very unfair that a tenant can always obtain an apportionment merely because his landlord cannot prove that, fourteen years previously, the rooms occupied by the tenant were not let as a separate dwelling-house. On the other hand, the tenant protests that he cannot be expected to prove that certain rooms in another person's house were not let as a separate dwelling on August 3, 1914.

The county court judge held that, when the tenant in the present case had proved that the whole house was let at a rent of 70*l.* on August 3, 1914, he had discharged the onus which was on him and had established a prima facie case of necessity for an apportionment and, in my view, in doing so he put the proper and most sensible construction on the Act of Parliament. I agree that when the tenant had adduced the evidence which I have mentioned, the onus was cast on the landlord to show that the rooms occupied by the tenant were let as a separate dwelling-house on August 3, 1914, and that, therefore, an apportionment of the rent of the whole house was unnecessary.

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FINLAY J. I am of the same opinion, although I, too, feel some doubt. It is clear that a tenant who applies for an apportionment must establish facts from which it may properly be inferred that an apportionment is necessary. Accepting fully that principle of the onus of proof, it seems to me that a tenant discharges that onus and proves facts which, uncontradicted, establish that an apportionment is necessary when he shows that the rooms occupied by him formed part of premises which were let as a whole in 1914. I agree that the county court judge was right in thinking that the tenant in the present case had proved enough to shift the burden of proof to the landlord.

Appeal dismissed.

Solicitor for landlord: *H. M. Everard.*
Solicitor for tenant: *H. Fishman.*

G. F. L. B.

ALDRIDGE *v.* WRIGHT.

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Dec. 20.

Easement—Right of Way—Not Easement of Necessity—Implied Reservation.

In 1901 the common owner under a long lease of two tenements, A. and B., assigned his interest in tenement A. to the predecessor in title of the plaintiff without expressly reserving any rights over the tenement. In 1904 he assigned his interest in tenement B. to the predecessor in title of the defendant. Both before and after 1901 the occupier of tenement B. had used a way across the garden of tenement A. to convey refuse and coal to and from a passage way leading to the street and running by the side of tenement A. :—

Held, that, as the right to use the way across the garden of tenement A. did not constitute an easement of necessity, its reservation in favour of the occupier of tenement B. was not to be implied in the assignment of tenement A. in 1901.

Wheeldon v. *Burrows* (1879) 12 Ch. D. 31 followed.

Thomas v. *Owen* (1887) 20 Q. B. D. 225 discussed and not followed.

Appeal from Wandsworth County Court.

In 1895 two dwelling-houses, No. 28 and No. 30 Selwyn Avenue, Richmond, Surrey, were both owned by one E. Hawkins, who, on October 5, 1895, granted a ninety-nine years' lease of them to H. J. Hawkins. In 1896 H. J. Hawkins assigned his interest in both houses to one Gilbert. On September 10, 1901, Gilbert assigned his interest in No. 30 to one Stevens, the predecessor in title of the plaintiff, Mrs. Augusta Aldridge, who, after further assignments, acquired the remainder of the term in 1926. On March 17, 1904, Gilbert assigned his interest in No. 28 to one Higgott, the predecessor in title of the defendant, Mrs. Margaret Mary Wright, who, after further assignments, acquired the remainder of the term in 1927.

Along the boundary of No. 30 Selwyn Avenue farthest from No. 28 a passage way ran from the road to the back of the property. There was a gate in the garden fence of No. 30 leading from the garden into the passage, and there was also a gate in the fence which separated the garden of No. 30 from that of No. 28. A path across the garden of No. 30 connected the two gates, and there was evidence before the county court judge that both at the time when the properties

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were held in common ownership and after the severance of their ownership the way from No. 28 through the two gates and across the garden of No. 30 had been used by the tenant of No. 28 to remove dust from and to bring coal into No. 28. The lease under which the plaintiff held No. 30 contained no reservation for the owner or occupier of No. 28 of any right of way for any purpose over the garden of No. 30. The lease under which the defendant held No. 28 contained no express grant of any right of way over the garden of No. 30, but the lessor demised the property "with all rights, easements and appurtenances whatsoever to the said premises belonging or appertaining."

In 1928 the plaintiff complained that the defendant had abused the privilege of the use of the way which, she said, she had allowed as a matter of courtesy only. The defendant claimed the use of the way as a right. In an action in the county court in which the plaintiff claimed damages for alleged trespass and an injunction and the defendant counter-claimed damages for alleged interference with her right of way and an injunction, the county court judge held that the defendant was entitled to use the way across the garden of No. 30 for the removal of her dust and the carriage of coal and he entered judgment in her favour.

The plaintiff appealed.

Havers for the plaintiff. The county court judge disregarded the fact that the assignment of No. 30 to the predecessor in title of the plaintiff was before the assignment of No. 28 to the predecessor in title of the defendant. That being the sequence of events, no reservation could be implied in the assignment of No. 30 of an easement, or quasi easement, not being an easement of necessity, such as is claimed by the defendant: *Wheeldon* v. *Burrows* (1), approved in *Union Lighterage Co.* v. *London Graving Dock Co.* (2), and applied in *Ray* v. *Hazeldine* (3); while in *Brown* v. *Alabaster* (4) Kay J. said that the distinction drawn in *Wheeldon* v. *Burrows* (1) between the implied grant

(1) 12 Ch. D. 31.
(2) [1902] 2 Ch. 557.
(3) [1904] 2 Ch. 17.
(4) (1887) 37 Ch. D. 490, 505.

of an easement and the implied reservation of an easement had been recognized ever since.

du Parcq K.C. (*Charles Bray* with him) for the defendant. The defendant was entitled to judgment, although, perhaps, owing to a misconception of the relevant dates, not on the grounds relied on by the county court judge. There was evidence on which the county court judge could have found that when No. 30 was assigned in 1901 the occupier of No. 28 had enjoyed, and was enjoying, a continuous and apparent easement over the garden of No. 30 in the form of a right to use the way for the carriage of coal and refuse. In those circumstances that easement, or quasi easement, was impliedly reserved in the grant of No. 30: *Thomas* v. *Owen* (1) (see particularly per Fry L.J. (2)), a decision which has never been dissented from, but which was followed in *Westwood* v. *Heywood.* (3) *Wheeldon* v. *Burrows* (4) and *Union Lighterage Co.* v. *London Graving Dock Co.* (5) are distinguishable on the facts. *Brown* v. *Alabaster* (6) emphasises the doctrine that the conveyance of a dominant tenement includes the appurtenant easements and shows the inclination of the law in this respect.

[He also referred to Goddard's Law of Easements, 8th ed., p. 177.]

SHEARMAN J. This appeal raises an interesting question, because the Court is called on to decide the respective weight of authority of two decisions of the Court of Appeal.

It is clear that the conveyance by the last common owner of these two properties of what has been called the servient tenement—No. 30—to the predecessor in title of the plaintiff was prior in date to the conveyance of the dominant tenement —No. 28—to the predecessor in title of the defendant, but the county court judge confused the dates, concluded that the first conveyance was that of the dominant tenement, and, as that conveyance included " all rights, easements and appurtenances " belonging or appertaining to the property,

(1) 20 Q. B. D. 225.
(2) Ibid. 231.
(3) [1921] 2 Ch. 130.
(4) 12 Ch. D. 31.
(5) [1902] 2 Ch. 557.
(6) 37 Ch. D. 490.

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held that it included the right to convey dust and coal through the garden of No. 30. I agree that there was evidence on which the county court judge might have found that for a long time there had been a continuous and apparent quasi easement of that character, but he states no finding on the subject, his decision being obviously founded on a mistaken view of the facts.

The present appeal is based on certain well considered authorities—namely, the line of cases which crystallized in *Wheeldon* v. *Burrows* (1), and decided that, while the grant of part of a tenement, particularly if it includes the word "appurtenances," will pass to the grantee, not only any easement of necessity, but also any continuous and apparent easement, or quasi easement, over the other part of the tenement which was enjoyed with the part granted at the time of the grant, the reservation by the grantor of any easement other than an easement of necessity over the tenement granted must be in express language. Mr. du Parcq has argued that certain other cases, particularly *Thomas* v. *Owen* (2), have decided that the rule laid down in *Wheeldon* v. *Burrows* (1) must not be followed too implicitly, and that the reservation of a continuous and apparent easement may be implied in a grant. *Thomas* v. *Owen* (2) and *Wheeldon* v. *Burrows* (1) obviously conflict, and, in my opinion, *Wheeldon* v. *Burrows* (1) and the cases which have approved of it express the rule which ought to be applied in both the King's Bench and the Chancery Divisions.

In *Wheeldon* v. *Burrows* (3) Thesiger L.J. pointed out that there were common law cases, particularly *Pyer* v. *Carter* (4), which conflicted with the rule laid down by Lord Westbury in a very valuable judgment in *Suffield* v. *Brown* (5), that the grant of a continuous and apparent easement of convenience might be implied, but that, in no circumstances, could the reservation of such an easement be implied, the only easement reservation of which could be implied being an easement of

(1) 12 Ch. D. 31.
(2) 20 Q. B. D. 225.
(3) 12 Ch. D. 31, 52 et seq.
(4) (1857) 1 H. & N. 916.
(5) (1863) 4 D. J. & S. 185.

necessity. Later, came *Thomas* v. *Owen* (1), in which it was held that there was an implied reservation in a lease of a right of way which was an easement of convenience and not of necessity. I agree that *Thomas* v. *Owen* (1) was decided by a strong Court of Appeal, but nowhere in the argument was either *Suffield* v. *Brown* (2) or *Wheeldon* v. *Burrows* (3) alluded to, although many common law cases were cited. Fry L.J., in his judgment, said (4): "But then it is urged that alike in implied reservations and in implied grants a rule exists to this effect, that whilst such an implication may arise in the case of easements of necessity and continuous easements, it cannot arise in the case of easements which are neither of necessity nor continuous, and for this proposition *Polden* v. *Bastard* (5) is cited, and many other authorities might have been invoked. But on this principle, as established by such decisions, there has been engrafted by other decisions an exception in the case of a formed road made over an alleged servient tenement to and for the apparent use of the dominant tenement . . . .; and if the exception arises in the case of a grant we think it ought to arise in the case of a reservation made to support an earlier grant, as in the present case." It is not for me to criticise that, but the Lord Justice gives the go-by to the very important decision of *Wheeldon* v. *Burrows* (3), affirming *Suffield* v. *Brown* (2), that there is a clear distinction between an easement of necessity and an easement of convenience, and that it is only easements of necessity which supply an exception to the rule that a reservation of an easement cannot be implied in a grant.

In support of the value of *Thomas* v. *Owen* (1) we were referred to *Westwood* v. *Heywood* (6), where Astbury J. in his judgment speaks of "the rule in *Thomas* v. *Owen*." (7) *Wheeldon* v. *Burrows* (3), however, had not been cited to him. On the other hand, we were referred to cases, particularly

(1) 20 Q. B. D. 225.
(2) 4 D. J. & S. 185.
(3) 12 Ch. D. 31.
(4) 20 Q. B. D. 225, 231.
(5) (1865) L. R. 1 Q. B. 156.
(6) [1921] 2 Ch. 130.
(7) [1921] 2 Ch. 139.

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Union Lighterage Co. v. *London Graving Dock Co.* (1), in which the principles laid down in *Wheeldon* v. *Burrows* (2) were unquestionably applied with complete approbation. I agree that the facts differed, but in *Union Lighterage Co.* v. *London Graving Dock Co.* (1) it was not suggested that the principle laid down in *Wheeldon* v. *Burrows* (2) was other than the guiding principle.

On the whole, I think that we are bound to prefer *Wheeldon* v. *Burrows* (2), and that line of authority to the *Thomas* v. *Owen* (3) line of authority, and, applying the principle of *Wheeldon* v. *Burrows* (2), to hold that, as the grant of the dwelling-house, No. 30, and its garden was made to the plaintiff's predecessor in title without the express reservation of any right of way over the garden, it is not open for the defendant to say that she is entitled to such a right of way, and that such use of the way as has been permitted has been as a courtesy accorded to a neighbour. In my judgment, therefore, this appeal succeeds, and the plaintiff must have an injunction and whatever damages have been agreed.

FINLAY J. With some doubt, I agree. I have no doubt that the judgment of the county court judge cannot stand, simply because it was based on an unfortunate misconception of the relevant dates, which resulted in his failing to apply his mind to the real point for decision. My doubt arises on whether we ought to send the case back to the county court judge, or to decide it in favour of the plaintiff.

The authority of *Wheeldon* v. *Burrows* (2) is unchallenged. It was the decision of a strong Court of Appeal, and later authorities have expressly approved it. I need only refer to the fact that in *Union Lighterage Co.* v. *London Graving Dock Co.* (1) both Romer L.J. (4) and Stirling L.J. (5) referred to *Wheeldon* v. *Burrows* (2) as being the governing authority on the point with which we are concerned here. Stirling L.J. (5) proceeds to cite with obvious approval the two rules which were laid down in *Wheeldon* v. *Burrows*. (2)

(1) [1902] 2 Ch. 557.
(2) 12 Ch. D. 31.
(3) 20 Q. B. D. 225.
(4) [1902] 2 Ch. 570.
(5) Ibid. 572.

It is admitted that, if those rules are applied in the present case, the plaintiff must succeed.

Mr. du Parcq, however, has caused me doubt by referring to *Thomas* v. *Owen* (1) and *Westwood* v. *Heywood* (2), the importance of the latter decision being that Astbury J. seemed to regard *Thomas* v. *Owen* (1) as so well recognized that there was "a rule in *Thomas* v. *Owen*." (3) The facts in *Thomas* v. *Owen* (1) differed greatly from the facts of the present case, but I agree that another strong Court of Appeal did apparently depart from the principles laid down in *Wheeldon* v. *Burrows* (4), and recognized exceptions to those principles of which there was no suggestion in *Wheeldon* v. *Burrows*. (4) Owing to the misapprehension to which I have alluded the county court judge did not find any facts which would, or would not, bring this case within the exceptions to the general rule laid down in *Thomas* v. *Owen*. (1) He might have found the facts on that point either way and, if I thought that the law had departed from the principles of *Wheeldon* v. *Burrows* (4), if I thought that there were exceptions other than the one exception recognized in *Wheeldon* v. *Burrows* (4) to the principle that the reservation of an easement must be express, I should hold the view that the case ought to go back to the county court judge for the facts to be ascertained. It is because, on the whole, I have come to the conclusion that the true view of the law is that stated by the Court of Appeal in *Wheeldon* v. *Burrows* (4) that I feel that it would not be useful to remit the case for the ascertainment of facts which, on the assumption that *Wheeldon* v. *Burrows* (4) was properly decided, are immaterial. The appeal must be allowed.

Appeal allowed.

Solicitors for plaintiff: *J. T. Lewis & Woods.*
Solicitors for defendant: *Calvert Smith & Co.*

(1) 20 Q. B. D. 225.
(2) [1921] 2 Ch. 130.
(3) [1921] 2 Ch. 139.
(4) 12 Ch. D. 31.

G. F. L. B.

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Jan. 18.

FAREY *v.* WELCH AND ANOTHER.

Criminal Law—Mens rea—House Pigeon—Taking under Belief of Ownership —"Unlawfully and wilfully . . . . take"—Larceny Act, 1861 (24 & 25 *Vict. c.* 96), *s.* 23.

Sect. 23 of the Larceny Act, 1861, enacts that if any one unlawfully and wilfully takes a pigeon under circumstances which would not amount to larceny at common law, he commits an offence:—

Held, that the section applies the general law of larceny to pigeons so far as it does not apply to them already: and that, consequently, a taker who honestly believed the pigeon taken to be his own was not within the section.

Taylor v. *Newman* (1863) 4 B. & S. 89 followed.

Horton v. *Gwynne* [1921] 2 K. B. 661 observed upon.

CASE stated by Kingston (Surrey) Quarter Sessions.

At a court of summary jurisdiction sitting at Richmond on April 26, 1928, an information was preferred by the respondents, Douglas and Harry Welch, against the appellant, William Farey, charging that he did unlawfully and wilfully take a pigeon, the property of the respondent Douglas Welch, under such circumstances as did not amount to larceny at common law, contrary to s. 23 of the Larceny Act, 1861. (1)

The appellant and respondents were in the habit of keeping a large number of pigeons upon neighbouring premises. Prior to April 23, 1928, both the appellant and the respondents had been from time to time upon each other's premises in order to recover straying pigeons. On April 23, 1928, the appellant was admitted by the respondents to their premises and claimed that the pigeon, the subject-matter of the charge, was his property. It was handed to him by Douglas Welch for examination. The appellant, in spite of repeated asseverations of ownership by the respondents, attempted to take the pigeon away. A constable was called, and the appellant given into custody. The appellant, at the time he attempted to take the pigeon, honestly believed that it was his property,

(1) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 23: "Whosoever shall unlawfully and wilfully kill, wound, or take any house dove or pigeon under such circumstances as shall not amount to larceny at common law, shall, on conviction before a justice of the peace, forfeit and pay, over and above the value of the bird, any sum not exceeding two pounds."

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but in fact it was the property of the respondent, Douglas Welch.

The justices convicted the appellant and fined him ten shillings. He appealed to quarter sessions, which dismissed the appeal but stated this case.

Theodore Turner for the appellant. The conviction was wrong. The justices failed to give effect to the words in s. 23 of the Act of 1861: "under such circumstances as shall not amount to larceny at common law." No explanation is given of the fact that, if their decision is right, the law now deals with pigeons in a manner different from that in which it deals with any other property. At common law pigeons could not be the subject-matter of larceny unless they were in captivity or could be reduced into possession at any moment. In *Taylor* v. *Newman* (1), a decision under this section, it was held that it meant that anybody who killed a pigeon under such circumstances as that but for the peculiar doctrine of the law relating to pigeons it would be larceny, was guilty of an offence. Therefore in the present case the prosecution must prove all the ingredients of larceny. They have admittedly failed to prove mens rea, an intent to steal. *Taylor* v. *Newman* (1) was not dissented from by the Divisional Court in *Horton* v. *Gwynne* (2), also a decision under this section.

[*Reg.* v. *Cheafor* (3) was also referred to.]

Roland Oliver K.C. and *Wishart* for the respondents. Sect. 23 has nothing to do with larceny, but only imposes a small penalty on persons who interfere with other people's property. It was enacted owing to the liability of pigeons to mix with other people's pigeons. Sect. 21 is the section which deals with the larceny (inter alia) of pigeons. The effect of the sections is this: If a pigeon is the subject-matter of larceny—i.e., is in captivity—it can be stolen under s. 21, but if it is taken under circumstances that it cannot be the subject-matter of larceny, then, if taken unlawfully and

(1) 4 B. & S. 89.
(2) [1921] 2 K. B. 661.
(3) (1851) 2 Den. C. C. 361.

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wilfully, an offence under s. 23 is committed. Here the taking did not amount to larceny, but it was unlawful, because it was a conversion, and it was wilful—i.e., "done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it"—per Lord Russell C.J. in *Reg.* v. *Senior.* (1) In *Taylor* v. *Newman* (2) the accused was not acting unlawfully, because he killed the pigeon in defence of his crops. The suggestion that a man who takes a pigeon with all the circumstances attending larceny except that the thing taken is not the subject-matter of larceny is to be fined 2*l.*, while if he steals it under s. 21 he can be sentenced to six months' imprisonment seems absurd. Blackburn J. was wrong in holding that s. 23 applies to acts which would be larceny but for the peculiar nature of the law relating to pigeons. The insertion of "steal" in s. 21 and its omission in s. 23 was deliberate, because in the latter section an intention to steal is not an ingredient in the offence, and that is why the penalty is so small.

Turner in reply. The argument for the respondents gives no effect to the words in s. 23 "at common law." "Take" in the section does not mean "take away" in the sense used in defining larceny, but means "catch": *Rex* v. *Glover.* (3)

Roland Oliver K.C. This point was expressly abandoned at the trial.

The following judgments were read :—

LORD HEWART C.J. Sect. 23 of the Larceny Act, 1861, under which the information in this case was preferred, is as follows: "Whosoever shall unlawfully and wilfully kill, wound, or take any house dove or pigeon under such circumstances as shall not amount to larceny at common law, shall, on conviction before a justice of the peace, forfeit and pay, over and above the value of the bird, any sum not exceeding

(1) [1899] 1 Q. B. 283, 291. (2) 4 B. & S. 89.
(3) (1814) Russ. & Ry. 269.

two pounds." And the question here is whether under that section it is an offence to "take" a pigeon in circumstances in which, if the thing taken were other than a pigeon, there would be no larceny at common law; or whether, on the other hand, the section merely applies the general law of larceny to pigeons, so far as it did not apply to them at common law, without otherwise affecting the nature of larceny. It was not disputed that what the appellant did in this case, namely, take the respondent's pigeon in the honest belief that it was his own, is not larceny at common law.

The construction of this section of the Larceny Act, 1861, was considered and decided by the Court of Queen's Bench in *Taylor* v. *Newman*. (1) There the appellant was prosecuted under s. 23 for killing a pigeon. It appeared that he had killed on his own land a pigeon belonging to the respondent, after a warning that he would destroy the respondent's pigeons if they continued to come and feed on his land. Having shot the bird, he did not take it away, but left it on the ground. It was argued for the appellant that it was necessary in order to justify a conviction under the section that there should have been a guilty intention to deprive a man of his property; in other words that the intention of the section was to bring pigeons within the law of larceny so far as they were not within it already, without otherwise altering the law. The Court so held. Lord Blackburn, then a judge of the Court of Queen's Bench, after considering not only s. 23 but also ss. 21 and 22 of the Act, and explaining that s. 23 (re-enacting a similar provision in s. 33 of 7 & 8 Geo. 4, c. 29) was passed because of the doubt which had existed whether a tame pigeon when flying about is property and the subject of larceny, said (2): "We must construe [the section] as meaning that whosoever shall kill a pigeon under such circumstances as that but for the peculiar doctrine of the law relating to property in pigeons it would be larceny, shall be liable to a penalty." With this conclusion Mellor J., the only other member of the Court, agreed, saying (2) that the section was not intended to apply to a

(1) 4 B. & S. 89. (2) 4 B. & S. 94.

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case in which there was no guilty mind. The case therefore plainly decides that s. 23 deals with such killing, wounding and taking only as are done without the felonious intention of stealing. It being conceded that in the case before us there was no such intention, it follows that if *Taylor* v. *Newman* (1) is right this conviction cannot be supported; and this was admitted by counsel for the respondents. We were invited to disregard *Taylor* v. *Newman* (1), or at any rate its ratio decidendi, on the authority of *Horton* v. *Gwynne*. (2) As to that case it is enough to say that the learned judges who decided it, on different facts after argument only on one side, had no power, and accordingly did not purport to overrule *Taylor* v. *Newman* (1), but on the contrary appear to have relied on it as supporting their judgment.

In these circumstances it appears to me that we ought to follow *Taylor* v. *Newman* (1), and to say that the appeal must be allowed and the conviction quashed. I may perhaps add that, having regard to the state of the law before the passing of 7 & 8 Geo. 4, c. 29, s. 33 (which is in the same terms as s. 23 of the Larceny Act, 1861), and to the language of those sections, *Taylor* v. *Newman* (1) seems to be a perfectly satisfactory decision. In other words, before the first named statute was enacted, there were certain circumstances in which the "taking" of a pigeon was larceny, while there were other circumstances in which—by reason only of the legal doctrine relating to property in pigeons—the "taking" of a pigeon did not amount to larceny. What the section did was to impose a special penalty in circumstances of the latter kind.

TALBOT J., who is on circuit, desires me to say that he has read this judgment and concurs therein.

AVORY J. Apart from the question whether there was in this case any physical act of "taking," as to which an admission appears to have been improvidently made at the trial by the learned counsel for the appellant, I am of opinion

(1) 4 B. & S. 89. (2) [1921] 2 K. B. 661.

that on the facts of this case there was not any "taking" of the pigeon within the meaning of s. 23 of the Larceny Act, 1896, and that the word "taking" in this section should be construed as meaning "catching," and not as meaning taking away; in other words it is intended to apply to an act in the nature of poaching—vide *Rex* v. *Glover* (1), where it was held that the word "take" should be so construed in a similar section relating to rabbits. I think that the expression "under such circumstances as shall not amount to larceny at common law" is meant to apply to cases such as *Reg.* v. *Townley* (2), where it was held that if the killing and taking away of an animal ferae naturae are one continuous act it is not larceny, and to cases such as *Rex* v. *Brooks* (3), where the question was whether the bird had been reclaimed so as to be the subject of larceny, and for these reasons also, while agreeing, as I do, with the judgment of my Lord, I think the appeal should be allowed and the conviction quashed.

Appeal allowed.

Solicitors for appellant: *Calvert Smith & Co.*
Solicitors for respondent: *Oswald Hanson & Smith.*

(1) Russ. & Ry. 269. (2) (1870) L. R. 1 C. C. 315.
(3) (1829) 4 C. & P. 131.

W. L. L. B.

1928
Dec. 20.

FITZGERALD *v.* NATIONAL BANK, LIMITED.

[1928. F. 1389.]

Will—Debt—Legacy by Debtor to Creditor of equal Amount—Debt to carry Interest—Interest due at Date of Death—Whether Legacy given in Satisfaction of Debt.

A person, who borrowed 100*l.* carrying interest at 5 per cent. per annum, by his will left a legacy of 100*l.* free of duty to his creditor. The will did not contain any direction to pay debts. At the date of the debtor's death there was interest due and unpaid in respect of the debt. The executors of the deceased paid the creditor the amount of the legacy and interest on the debt up to the date of payment. The creditor then sued for the amount of the debt:—

Held, that the rule, that a legacy to a creditor of an amount equal to or greater than the debt owed by the testator to the creditor operated as a satisfaction of the debt, applied notwithstanding that there was interest due and unpaid in respect of the debt at the date of the testator's death.

TRIAL OF ACTION before Talbot J. under Order XIV. as a short cause.

The plaintiff, Michael Fitzgerald, brought this action against the defendants, the National Bank, Ld., who were sued as the executors of the will of the late James Gubbins Fitzgerald, to recover 100*l.*, money lent by the plaintiff to the said James G. Fitzgerald on or about September 23, 1925, together with interest thereon at the rate of 5 per cent. per annum.

James G. Fitzgerald was the uncle of the plaintiff, and had borrowed 100*l.* from him. On September 23, 1925, James G. Fitzgerald gave his nephew a certificate as follows:—

"This is to certify that my nephew, Michael Fitzgerald, Esq., of Ballina House, Kilmallock, co. Limerick, has lent me the sum of one hundred pounds at interest of 5 per cent. per annum, and that he or his assigns is entitled to be paid the said one hundred pounds at any time he desires to call it in or be paid by my executors as a first claim on the residue of my estate after my death."

"James G. Fitzgerald."

On February 27, 1926, James G. Fitzgerald, the uncle, made his will appointing the defendants to be his executors and trustees, and by that will he gave to his nephew, Michael Fitzgerald, a legacy of 100*l.* free of duty. The will did not contain any direction to pay debts.

James G. Fitzgerald died on May 7, 1926, without having revoked his said will. Shortly after his death the plaintiff handed to the defendants, as executors of the deceased, the acknowledgment by the deceased of the debt of 100*l.*, and claimed to be paid that amount. The defendants' solicitors wrote to the plaintiff that the legacy was given in satisfaction of the debt, and that the defendants as executors of the deceased could not pay both the legacy and the debt.

On September 18, 1926, the defendants paid to the plaintiff his legacy of 100*l.*, and took from him his receipt on the back of the legacy duty form in the ordinary way.

The plaintiff issued his writ in the present action on September 17, 1928, and on October 31, 1928, the defendants paid to the plaintiff the interest on the debt of 100*l.* from September 23, 1925, to the date of payment of the legacy—namely, September 18, 1926—at the rate of 5 per cent. less tax.

G. V. Cameron for plaintiff. The will speaks from the testator's death. At that date there was interest due in respect of the debt, and therefore the debt exceeded the legacy by the amount of the interest that was then due, and consequently the presumption that a debt is satisfied by a legacy of equal or greater amount does not arise.

Harold Murphy for the defendants. The rule that a legacy to a creditor of an amount equal to or greater than a debt owed by the testator to the creditor is prima facie to be considered a satisfaction of the debt, which was laid down in *Talbot* v. *Duke of Shrewsbury* (1), applies in this case, more especially as there was no direction in the will to pay debts. In *In re Rattenberry* (2) a testatrix gave to R. a legacy of 400*l.* and appointed her executrix. At the time of her death

(1) (1714) Prec. Ch. 394; 2 White and Tudor's L. C., 9th ed., p. 323.
(2) [1906] 1 Ch. 667.

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the testatrix was indebted to R. in the sum of 150*l.*, which carried interest, and on which interest had been paid up to her death. It was sought to exclude the rule on the ground that the debt carried interest from the death and the legacy from one year after the death. But Swinfen Eady J. held that that fact did not take the case out of the general rule, and that the legacy was a satisfaction of the debt. He said (1): "The fact, therefore, that the legacy is given generally, without any reference to time of payment or interest, will not exclude the rule." In *In re Fletcher* (2) a testator made a will by which he bequeathed his wife a legacy of 625*l.* At that time he owed her that exact amount, on which he paid interest. He paid off the debt in his lifetime, and it was held that the sum left by will was not payable as a legacy. North J. said (3): "But it is said that in order to treat the legacy as adeemed by such means it is necessary that the purpose must appear on the face of the will. It is clear that if the codicil had said in so many words that the legacy of 625*l.* was given in satisfaction or payment of the debt, and the testator had afterwards paid the debt to her, she could not have got the legacy. I do not think that is disputed. But it is said that because there is no such reference to the debt in the bequest the payment of it cannot have that effect, and the legacy must not be treated as having been given for that purpose only. Suppose the debt had not been paid, could the widow have taken the debt as well as the legacy? I think clearly not." The hypothetical case put is like the present case, for it is unlikely that North J. was assuming that no interest was due at the death. Whenever a person owes a debt and afterwards by will gives a legacy of the same amount as the debt to the creditor, there is a presumption of an intention on the part of the debtor that the legacy should be in satisfaction of the debt. If the contention put forward on behalf of the plaintiff is correct the rule cannot apply whenever a debt bears interest, except in the very exceptional circumstances of the interest having been paid

(1) [1906] 1 Ch. 672.
(2) (1888) 38 Ch. D. 373.
(3) (1888) 38 Ch. D. 376.

up to the date of the testator's death. In 1714, when the rule was laid down, a debt had to be sued for in an action of debt, whereas interest on the debt had to be recovered by assumpsit in damages: *Seaman* v. *Dee.* (1) In an action of debt the defendant could wage his law, but that could not be done in an action of assumpsit. The debt that is referred to in the rule laid down in 1714 in *Talbot* v. *Duke of Shrewsbury* (2) is a debt which could be sued for as a debt according to the law that was then prevailing, and that did not include interest on the debt. There is no authority on the point.

G. V. Cameron in reply. In *In re Fletcher* (3) the debt was paid off in the lifetime of the testator, and therefore the question of adding interest to the debt did not arise. North J. said (4): "In the present case I think it is very probable that the widow herself took the view that the legacy was intended to provide for the debt. But I do not think she is bound in any way by the opinion she may have had, and I pay no attention to that." Swinfen Eady J. set out the contentions in *In re Rattenberry* (5), where he said: "It is sought to exclude the rule on the ground that the debt carries interest from the death and the legacy only from one year after the death." The judge was, therefore, not directing his intention to interest on a debt which had accrued due before the death, but only to interest which accrued due from the death. In that case interest on the debt did not accrue due from day to day, as in this case. The right to sue for the interest due before the death would be destroyed if the debt was satisfied by the legacy.

[TALBOT J. I do not think that is so, as the procedure for the recovery of a debt and for the recovery of interest on the debt was by quite different actions. In 1714 a "debt" did not include interest.]

Where a debtor makes a payment on account of a debt and interest and seeks to appropriate the sum to payment of the debt the creditor has an absolute right to appropriate

(1) (1672) 1 Vent. 198.
(2) Prec. Ch. 394.
(3) 38 Ch. D. 373.
(4) 38 Ch. D. 375.
(5) [1906] 1 Ch. 670.

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the sum to payment of the interest: see *Bower* v. *Marris*. (1) At the time payment of 100*l*. was made in respect of the legacy 103*l*. was due in respect of the debt and interest. The creditor was entitled to appropriate enough of the 100*l*. to satisfy the interest that was then due. That left only 97*l*., which was not sufficient to pay the debt, and therefore the debt has not been satisfied by the payment of the legacy. The doctrine of satisfaction of a debt by a legacy is being narrowed more and more by judges. Lord Hardwicke said in *Clark* v. *Sewell* (2) that the doctrine of satisfaction had been carried too far, and that the Courts had laid hold of any circumstances to get out of the rule. Under Order LV., r. 64, of the Rules of the Supreme Court, where a judgment or order is made directing an account of legacies, interest is computed on such legacies at the rate of 4 per cent. per annum from the end of one year after the testator's death, whereas interest on this debt was to be paid at the rate of 5 per cent. per annum to accrue from day to day; therefore the legacy was not so beneficial in every way to the creditor as the debt, and therefore the debt ought not to be considered as having been satisfied by the legacy.

TALBOT J. The question in this case is whether the uncle, James G. Fitzgerald, having left to his nephew, Michael Fitzgerald, a legacy of 100*l*., which legacy has since been paid, the debt of 100*l*. which the uncle owed to his nephew must be taken to have been satisfied by the payment of the legacy, so as to preclude the nephew from recovering the debt from the executors of his uncle. There is a well settled presumption of law that where a debtor leaves by will to his creditor a legacy of an equal or greater amount than the debt, the legacy when paid must be taken to have been given in satisfaction of the debt. This presumption has been often criticized by judges, but there is no doubt that it still exists.

The argument here has mainly turned upon this, that in the circumstances of this case the sum due in respect of the

(1) (1841) Cr. & Ph. 351, 356. (2) (1744) 3 Atk. 96, 97.

debt must necessarily be different from the legacy by reason of the fact that the debt carries interest, and that the sum due in respect of debt and interest must necessarily be an uncertain amount; and it is said that therefore where a debt carries interest accruing from day to day there cannot be a presumption that a legacy of an equal amount to the debt was intended to be given in satisfaction of the debt. If that argument were valid it is inconceivable that no authority in support of it could be found during the long period which has elapsed since the presumption was first established. In the absence of any such authority I think it is my duty to follow the presumption, which is that where a man owes a sum of money to another, and then leaves by will to his creditor as a legacy a sum of money equal to or greater than the debt, the creditor should not have both the legacy and the debt; and to hold that this presumption is not rebutted by the fact that the debt carries interest from day to day. In my opinion the plaintiff is not entitled to recover the debt of 100*l.*, and accordingly there must be judgment for the defendants.

Judgment for defendants.

Solicitors for plaintiff: *Herbert Z. Deane & Co.*

Solicitors for defendants: *Stephenson, Harwood & Tatham.*

R. F. S.

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JAMES FINLAY AND COMPANY, LIMITED *v.* N. V. KWIK HOO TONG HANDEL MAATSCHAPPIJ.

[1925. J. 3045.]

Sale of Goods—C.I.F. Contract—Shipment in specified Months—Bill of Lading—Date of Shipment stated incorrectly—Duty of Seller to tender correct Bill of Lading to Buyer—Right of Buyer—Sub-contract—Measure of Damages—Minimizing Damage.

The seller under a c.i.f. contract tendered to the buyer a bill of lading which stated, not fraudulently but contrary to the fact, that the shipment had taken place in the contract month. Being unaware of this fact at the time of the tender, the buyer accepted the shipment, and entered into sub-contracts for the sale of a portion of the goods, those sub-contracts containing a clause that "the bill or bills of lading shall be conclusive evidence of the date of shipment." The sub-purchasers refused to take delivery, alleging that the shipment had not been made during the contract month. The buyer under the original contract having then ascertained that the goods had not been shipped during the contract month :—

Held, (1.) that he was entitled to damages for the breach by the seller of his obligation to deliver a bill of lading stating the date of shipment correctly, the measure of damages being the difference between the market price and the contract price of the goods; and (2.) that the buyer was not bound to enforce, for the purpose of minimizing the damages, the contracts with the sub-purchasers, as to do so, after he knew that the shipment date was incorrect, might seriously injure his commercial reputation.

Hall v. *Pim (Junior) & Co.* (1928) 33 Com. Cas. 324 considered.

Decision of Wright J. [1928] 2 K. B. 604 affirmed.

APPEAL from a decision of Wright J., reported [1928] 2 K. B. 604.

The plaintiffs were a company carrying on business as merchants in India and elsewhere with a house in London, and the defendants were merchants in Java dealing in the sale and shipment of sugar.

The plaintiffs claimed damages for the breach of three contracts made with the defendants in January and February, 1920, for the sale of sugar. By each of these contracts the defendants sold to the plaintiffs 300 tons of Java sugar at various specified prices c.i.f. Bombay. Shipment was to be made during the months of July, August and September, 1920; 100 tons of sugar were to be delivered under each of

the three contracts during each of the three months. The contracts provided for the opening of a credit by the buyers on their London house, which credit was to be confirmed by the bank if necessary, and the sellers were to draw thereunder in three months' sight drafts, for the due payment of which drafts at maturity the buyers remained responsible.

The dispute in the present case arose with regard to that portion of the three contracts which provided for the shipment during September of 100 tons of sugar under each of the three contracts. The defendants arranged that the 300 tons, which had to be shipped in September, should be shipped from Cheribon, in Java, by the steamship *Sealda*, a vessel belonging to the British India Steam Navigation Company. That vessel arrived at Cheribon on September 30, 1920, and sailed on October 3. Wright J. accepted the evidence of the captain that no cargo was loaded until the morning of October 1, and he accordingly found as a fact that the 300 tons of sugar which were tendered by the defendants under the contracts as being a September shipment, were not a September shipment, and therefore were not in accordance with the contracts.

The bills of lading in respect of these 300 tons of sugar were signed by the ship's agents, who had an office at Samarang, but not at Cheribon. They were dated at Samarang, September 30, 1920. They purported to state that the 300 tons of sugar were " shipped in good order and condition by " the defendants " on board the *Sealda* lying at the port of Cheribon for carriage to Bombay." Wright J. said that he was satisfied that the shipment did not take place until after September 30, and he could only regard those documents as false, incorrect and inaccurate. The *Sealda* arrived at Bombay on November 9, and finished discharging her cargo on November 15.

The plaintiffs at the request of the defendants cabled a credit at the end of September. Drafts dated September 30, 1920, addressed to the plaintiffs in London and payable to the Hong Kong and Shanghai Banking Corporation, were

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then drawn by the defendants for the contract price of the sugar, payable three months after sight. These drafts, to which one set of shipping documents was attached, were sent to London and were duly presented by the Hong Kong and Shanghai Banking Corporation to the plaintiffs' house in London and were accepted on November 12, 1920, and payment therefore became due on February 15, 1921. The other copies of the shipping documents were sent to the plaintiffs' house at Bombay in order to enable them to obtain delivery of the sugar on arrival.

The plaintiffs, in the course of their business as merchants, made three sub-contracts for the sale to certain buyers at Bombay of a portion of the sugar which they had bought from the defendants. These sub-contracts provided for shipment in July, August and September, 1920, c.i.f. Bombay, at prices slightly higher than in the contracts between the plaintiffs and the defendants. Each of those sub-contracts contained a clause (No. 7) which provided that "The bill or bills of lading shall be conclusive evidence of the date of shipment." The plaintiffs appropriated to the September shipment due under those sub-contracts 150 tons of the sugar which was due by the *Sealda* in respect of the September shipment under the three contracts between the defendants and the plaintiffs. The sub-buyers however refused to take delivery of the 150 tons of sugar ex the *Sealda*, alleging that it was not a September shipment. The market price for sugar had fallen considerably since the date of the contracts in question. The plaintiffs, although they asked the sub-buyers to take delivery, did not take proceedings against them to compel them to do so, and eventually they sold the sugar by auction in December, 1920, the amount realized representing the fair market price of the sugar, but it was substantially less than the contract price payable under the contracts between the plaintiffs and the defendants.

The plaintiffs having ascertained later that the shipment was not a September shipment brought this action, claiming as damages the difference in price between the sum they paid to the defendants and the market price of the sugar.

There was practically no difference in the market price between September shipments and October shipments.

The defendants relied upon a custom, which, as pleaded, was as follows: "By the custom of the port of loading should a steamer which has contracted to take cargo for shipment during a particular month arrive at the loading port at which such cargo has been declared ready for shipment by the shippers at any time during the month and the cargo to be loaded on such steamer is ready in lighters during the month and loading takes place during a reasonable time after the vessel's arrival, then, notwithstanding that such cargo may not be loaded during the contracted month, it is accepted that the shipper fulfils his engagement in respect to the shipment period, and therefore all bills of lading for the cargo may bear the date of the month on the contract, notwithstanding the fact that the steamer may not have loaded during such month."

Wright J. found that the alleged custom had not been proved, and that in any event it could not be given effect to, as it was contrary to the express terms of the contract; and he held that it was an implied condition of the contract that the bill of lading to be tendered should be a true and accurate document and should correctly state the date of shipment; that if the bill of lading had stated the true date of shipment the plaintiffs could have rejected the tenders and refused to pay the cash or accept the draft; that as they were deprived of that right and paid for the sugar they were entitled to recover as damages for the breach of contract by the defendants the difference between the contract price and the market value of the sugar in question. With regard to the defendants' contention that by reason of clause 7 in the sub-contracts they could have forced the sugar on the sub-purchasers, and so recouped themselves for the money they had paid to the defendants, he accepted the evidence of the plaintiffs' manager, who said that in no case would the plaintiffs seek to enforce a contract with a misdated bill of lading on buyers from them, after they (the plaintiffs) had become aware of the fact that the bill of lading was

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incorrect. In those circumstances Wright J. held that the plaintiffs were not bound to take proceedings against the sub-purchasers in order to minimize the damage.

The defendants appealed.

Jowitt K.C. and *van den Berg* for the appellants. The only breach of contract committed by the appellants was in not shipping the sugar during the contract month, but as the respondents got precisely the same sugar as they would have got if the shipment had been in September, and as there was no difference in price between a September and an October shipment, the damages suffered by them were merely nominal. Wright J. wrongly superadded another breach, as at the time of tender of the documents. What the appellants did then was to make an innocent misrepresentation as to the date of the bill of lading, and for that damages are not recoverable.

[GREER L.J. Was there not a collateral warranty in reference to the documents? Are not the respondents entitled to damages for a breach of that warranty?]

There was no collateral warranty of the kind found by Wright J. In dealing with such a case as this the Court must, in considering the measure of damages, have regard to the contract as a whole, and not have regard to a mere part of it. The financial position of the respondents was precisely the same as if the contract had been duly fulfilled: see per McCardie J. in *Taylor & Sons* v. *Bank of Athens*. (1) The damages claimed by the respondents, therefore, do not naturally flow from the appellants' breach of contract. Further, Wright J. was wrong in disregarding the sub-contracts. If by reason of a sub-contract a buyer is entitled to claim larger damages against a defaulting seller, so the seller must be entitled to pray in aid a sub-contract to reduce the damages payable by him. The respondents had paid for the sugar; they had a valid contract with their sub-purchasers containing a clause providing that the bill of lading should be conclusive evidence of the date of shipment.

(1) (1922) 27 Com. Cas. 142, 147.

Why should they not enforce their rights under that sub-contract? There would have been nothing discreditable in doing so. The respondents ought to have enforced the sub-contracts. *Hall* v. *Pim* (*Junior*) *& Co.* (1) supports the view that the sub-contracts should be taken into account. It may be difficult to reconcile that decision with the previous decision of the House of Lords in *Williams Bros.* v. *Agius* (2), but to say that *Hall* v. *Pim* (*Junior*) *& Co.* (1) proceeded solely on the special facts there in question is to take too narrow a view of the decision. *Williams Bros.* v. *Agius* (2) is an authority for the proposition that the mere fact that there is a sub-contract does not entitle a party to claim to augment or to diminish the damages by reference to it; but if the Court comes to the conclusion that a sub-sale was a possible or a not unlikely thing and so must have been in the contemplation of the parties, the sub-contract must be taken into account. Here a sub-sale was a probable result of the transaction between the appellants and the respondents, and therefore the appellants are entitled to have the damages reduced by reference to that sub-contract.

Le Quesne K.C. and *D. B. Somervell* for the respondents. What we are concerned with is not merely the appellants' failure to ship the sugar during the contract month, but also their failure to furnish accurate shipping documents. It cannot be suggested that the appellants would have discharged their obligation under the contract if they had tendered a bill of lading bearing no date, but the novel proposition is advanced that it is immaterial if they furnish a bill of lading which is incorrectly dated. It is true that the respondents do not allege fraud on the part of the appellants; but, the tender of an inaccurate bill of lading is not a mere innocent misrepresentation, it is a breach of a condition of the contract. An essential part of a seller's duty under a c.i.f. contract is to tender a bill of lading accurately dated: *United Baltic Corporation* v. *Burgett & Newsam* (3); *Suzuki & Co.* v.

(1) (1928) 33 Com. Cas. 324. (2) [1914] A. C. 510.
(3) (1921) 8 Ll. L. Rep. 190, 191.

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Burgett & Newsam (1); *Berg & Sons* v. *Landauer & Co.* (2) If the bill of lading had been correctly dated the respondents would have rejected the tender and would have had the money in their pockets; but as they accepted the tender at a time when they were unaware of the breach of condition by the appellants in presenting an inaccurate bill of lading, they are entitled to recover the damages resulting from that breach, and these have been properly assessed by Wright J.

With regard to the sub-contracts, it is submitted that they are wholly irrelevant for this purpose: *Rodocanachi* v. *Milburn* (3); *Williams Bros.* v. *Agius.* (4) The decision in *Hall* v. *Pim* (*Junior*) *& Co.* (5) proceeded on the terms of the contract there being considered, which plainly contemplated that the buyer was intending to resell. In each case the question of what is reasonable for a person to do in mitigation of damages is one of fact: per Bankes L.J. in *Payzu* v. *Saunders* (6), and on the evidence in this case, which was accepted by Wright J., it would not have been reasonable or in the ordinary course of business to expect the respondents to seek to enforce the contracts against the sub-purchasers by virtue of the conclusive evidence clause therein.

[They referred to *Lishman* v. *Christie.* (7)]

Jowitt K.C. replied.

SCRUTTON L.J. If we had been differing from the view taken by Wright J. in this case I should have preferred to take time to consider the form of my judgment; and, further, if we were obliged to accede to Mr. Jowitt's invitation to explain the decision of the House of Lords in *Hall* v. *Pim* (*Junior*) *& Co.* (5) in view of the earlier decision of the House in *Williams Bros.* v. *Agius* (4) I should have had carefully to consider the language of my judgment; but as we propose to affirm the decision of Wright J., and as in my view the question of the relation of *Hall* v. *Pim* (*Junior*) *& Co.* (5) to

(1) (1922) 10 Ll. L. Rep. 223, 225.
(2) (1925) 23 Ll. L. Rep. 249.
(3) (1886) 18 Q. B. D. 67, 76, 77.
(4) [1914] A. C. 510.
(5) 33 Com. Cas. 324.
(6) [1919] 2 K. B. 581, 588.
(7) (1887) 19 Q. B. D. 333, 338, 339.

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Williams Bros. v. *Agius* (1) only arises indirectly, if at all, in the present case, I give judgment at once.

The point involved is a comparatively short one, but it is interesting and somewhat difficult on the question of the measure of damages. It arises in this way: a Dutch firm sold sugar to Finlay & Co., a well known English firm which also carries on business in India. The contract was for the shipment of sugar in three monthly instalments, the third of these being for September, 1920, and it is only in relation to the September shipment that the question arises. Since the decision in *Bowes* v. *Shand* (2) it has been well settled that on a sale of goods a condition as to the time of shipment is vital and is of the essence of the contract. Accordingly, if a person has contracted to sell a September shipment, it is useless for him to tender an October shipment and say that the difference is very little. In this case the Dutch firm had on September 30 sugar at a port in Java, ready for shipment, which would have satisfied the contract, and the ship on which the sugar was intended to be shipped had arrived at or off the port on that date. None of the sugar, however, was in fact loaded on the ship in September. Consequently the Dutch firm broke their contract with Finlay & Co. But more happened than that. Under a c.i.f. contract the sellers have not only to ship goods under the contract for carriage to the port of destination, they have to furnish the buyers with certain documents, among others (1.) a contract for the carriage of the goods, so that if they are lost during the voyage, in circumstances for which the ship is responsible, the buyers can recover their loss from the shipowner; and (2.) a policy of insurance covering the contract goods, so that if they are lost during the voyage by a risk covered by the policy the buyers can recover from the underwriters. It is unnecessary to discuss whether it is accurate to describe a c.i.f. contract as a sale of documents or as a sale of goods. In view of the fact that the goods may be lost before the documents are tendered and before the property has passed, there is a good deal to be said for the view that the contract

(1) [1914] A. C. 510. (2) (1877) 2 App. Cas. 455.

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is for a sale of documents; but at any rate it is an essential part of the contract that genuine documents relating to the goods complying with the contract should be tendered to the buyer. After the war, and possibly earlier, a lax practice began by which shippers of goods which should have been, but were not, shipped at the end of a particular month had a bill of lading provided for them dated as in the month of shipment, when it should have been dated after the month of shipment. Sometimes that was done on the shipper giving a letter of indemnity to the shipowner, whereupon the latter did what he ought not to have done—namely, misdate the bill of lading. Sometimes it was done by alleging a custom whereby a bill of lading might be dated in September when in fact the goods were not shipped, but which were ready for shipment or were in lighters ready for shipment, in that month. Whatever the reason, the practice was most undesirable, and certainly is not one which I should expect a great shipping line to countenance for a moment. But for some reason those who shipped the sugar on behalf of the Dutch firm obtained mate's receipts dated September 30, although the goods were not in the custody of the ship on that date, and took from the ship a bill of lading dated September 30. As under the contract the sellers had to provide Finlay & Co. with a bill of lading so that under it delivery might be obtained from the ship, and a policy of insurance, the Dutch firm sent forward the bill of lading which was wrongly dated. On receiving it, apparently in order, as it stated that shipment was in September, Finlay & Co. paid the contract price. The market had fallen heavily, and consequently they paid more than the market value of the sugar at that time. If the bill of lading had been correctly dated Finlay & Co. would have rejected the tender and kept the price in their pocket. Finlay & Co. had in fact subsold a portion of the 300 tons, and when they tendered the bill of lading to their sub-purchasers, the latter refused to take it on the ground that the sugar was not shipped in September. Whether the sub-purchasers had information which justified that view or whether they merely rejected

the tender because of the fall in the market does not appear; but they did reject and, so far as the goods were concerned, rightly so. In the sub-contract there was a provision that in case of rejection the goods should be sold by auction, and the price obtained would give the measure of damages, as compared with the contract price. Accordingly, under the sub-contracts Finlay & Co. might sue the sub-purchasers, but there were circumstances giving rise to suspicion, and Finlay & Co. sued the Dutch firm for breach of contract, and Wright J., having come to the conclusion on the evidence that the sugar was not shipped in September, awarded them as damages the difference between the price paid by Finlay & Co. and the value of the sugar at the time of the delivery in Bombay. It is said for the appellants that that is quite the wrong measure of damage. They contend that Finlay & Co. have lost nothing, because they have obtained goods of exactly the same value as they would have got under a September shipment. The judge rejected that contention, and took the view that it was a condition of the contract not only that the goods should be shipped in September but that a genuine bill of lading should be delivered showing the right date of shipment, i.e., September. As he said, if the bill of lading had shown that the shipment was in October, the tender would have been rejected by Finlay & Co., who would have kept in their pocket the price they paid under the contract, and the loss by the fall in the market would properly have fallen on the Dutch firm, because of their breach of contract in presenting an incorrect bill of lading. I agree with that view. Finlay & Co. do not claim the difference between the market value of the goods delivered and the price they would have got under the sub-contracts. If they had been claiming that difference in price as their damages, the question of the exact effect of *Hall* v. *Pim* (*Junior*) *& Co.* (1) and its relation to *Williams Bros.* v. *Agius* (2) would have arisen directly, and we might have been compelled to give the enlightenment for which Mr. Jowitt asked. As, however, Finlay & Co. are not claiming the difference between the

(1) 33 Com. Cas. 324. (2) [1914] A. C. 510.

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market price and the sub-contract price, but merely the difference between the market price and price under their contract with the Dutch firm, that question does not directly arise. The only way in which it may arise is in connection with the Dutch firm's contention that it was the duty of Finlay & Co. to minimize the damage by passing on the goods to the sub-purchasers under the contract with them, and if that had been done there would have been no damage. To that Finlay & Co. replied that it was quite true that they had a contract under which the sub-purchasers were bound to accept the date on the bill of lading as conclusive, but that if an action had been brought against the sub-purchasers, because of that conclusive evidence clause, to recover the price of goods which they, Finlay & Co., knew were not in accordance with the contract, that would not be in the ordinary course of business, would violate the standard of morality which should attach to an English firm of standing, and would in fact ruin their credit in India. Finlay & Co. accordingly declined to bring an action against the Indian sub-purchasers to compel them to take goods which were not in accordance with the contract. If the breach of contract by the original sellers was in doubt the position might be different. But a seller who has committed a breach of contract cannot, in my opinion, compel his buyer who has not broken his contract to take action to minimize the damage by claiming from another money to which he knows he is not entitled—a proceeding which will ruin his credit in the business world. It is impossible therefore to say that there was a duty on Finlay & Co. to minimize this damage by resorting to the contract with the sub-purchasers. I only desire to say, on the question of sub-contracts, that I hope the House of Lords may soon have an opportunity of explaining how their decision in *Hall* v. *Pim* (*Junior*) *& Co.* (1) is to be reconciled with their decision in *Williams Bros.* v. *Agius.* (2) The House of Lords cannot overrule its own decisions. In *The Turid* (3) there is an interesting passage

(1) 33 Com. Cas. 324. (2) [1914] A. C. 510.
(3) [1922] 1 A. C. 397, 413.

in the speech of Lord Sumner pointing out that there are many unreported decisions of the House of Lords which are nevertheless authorities and cannot be altered even by the House itself. Before the decision in *Hall* v. *Pim* (*Junior*) *& Co.* (1) we had been brought up to understand that, as a general rule, sub-contracts entered into by a buyer cannot be used to increase or minimize his damages, as the sub-contracts are incidental matters with which the seller had nothing to do. I find that laid down in *Rodocanachi* v. *Milburn* (2), which was affirmed in *Williams Bros.* v. *Agius* (3), and in an unreported case in which Greer L.J. was counsel the House repeated the language of *Williams Bros.* v. *Agius* (3), and affirmed *Rodocanachi* v. *Milburn.* (2) This Court in *Slater* v. *Hoyle & Smith* (4) applied the same principle, that unless the seller contemplates the possibility of a sub-contract under which a claim may be made on the buyer, the sub-contract must be disregarded for the purpose either of increasing or diminishing the damages. This was one of the many instances in English law where the measure of damage did not give the real loss suffered by the party. It seems to me, although, as I have already said, it is not necessary to express a final opinion on the point, that *Hall* v. *Pim* (*Junior*) *& Co.* (1) can only be explained by the particular terms of the contract in that case. It is well known to all concerned with commercial affairs that many of the trade associations recognize a form of dealing with a number of purchasers and sub-purchasers which it is difficult to relate to any legal principle. In cases where A. sells to B., then B. to C., and so on through the alphabet, the trade associations have set up a form of contract by which Z. can sue A., although he has no contract with A. That is difficult to fit in with legal principles. But in such a form of contract it may be said to A. that he must have contemplated that B. would sell to C. and so on, and, as far as I can understand, *Hall* v. *Pim* (*Junior*) *& Co.* (1) can only be reconciled with *Williams Bros.* v. *Agius* (3) by saying that it was founded

(1) 33 Com. Cas. 324.
(2) 18 Q. B. D. 67.
(3) [1914] A. C. 510.
(4) [1920] 2 K. B. 11.

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upon the fact that the contract entered into by the seller contemplated a series of string contracts with sub-purchasers, and so A. must be taken to have contemplated that the result of his breach of contract with B. might lead to claims on B. by sub-purchasers, although, as a matter of fact, with the machinery of the trade association it would lead not to a claim on B. but to a claim by Z. on A., the original seller.

For the reasons I have stated I think the view taken by Wright J. was correct, and the appeal must be dismissed.

GREER L.J. I agree. This appeal raises a question as to the measure of damages arising on a breach of three contracts for the sale of Java sugar to be shipped in the months of July, August and September, 1920, from Java to India. The contracts were on c.i.f. terms. [His Lordship referred to the terms of the contracts and continued :] The sugar for the September shipment was not shipped in that month but was put on board on October 1 and 2, but mate's receipts dated September 30 were given. How that came to be done we do not know, but it would not be right to assume that it was done fraudulently. Fraud was neither alleged nor proved, but that is immaterial to the result of the case, because the mate's receipts being wrongly dated caused the agent of the ship to take from the receipt a date for the bill of lading which was wrong. The bill of lading thus contained a false date in a material respect having regard to the terms of the contract. I am not at present prepared to say what I would hold if the question were whether a buyer is entitled to reject a cargo of goods where the bill of lading mentioned, say, the 5th of the month whereas in fact the goods were loaded on the 6th ; but I am clearly of opinion that a buyer would be entitled to reject the documents under a contract of this kind which called for September goods and the bill of lading stated, contrary to the fact, that the goods were shipped in September. That is as far as it is necessary to go in this case.

We have listened to a vigorous and very lucid argument from both counsel for the appellants to the effect that the

judge has taken the wrong measure of damages, and that if he had applied the correct measure he would have given nominal damages only. The respondents, the plaintiffs in the action, put their case in this way: they say that it was an express or implied term of the contract that the bill of lading should be correctly dated, and as it was not correctly dated they claim the difference between the contract price and the value of the goods which were in fact delivered to them, they having accepted the bill of lading on the assumption that it correctly stated the date of shipment. The respondents say that the appellants not merely promised to ship the sugar in September but by a distinct and separate promise undertook to hand a bill of lading which would truly state that the sugar was shipped in September; so their claim is not merely for damages for breach of contract to deliver the sugar to the ship in September but for damages for the breach of the undertaking to give a true bill of lading. It seems to me that that is the answer to Mr. Jowitt's vigorous argument that the two things to be compared are the position the respondents would be in, so far as money is concerned, if the whole agreement had been performed on the one hand, and the position they would be in if the whole agreement was not performed. What has to be considered is the plaintiffs' position as regards money if the particular term of the agreement had been performed, and they are to be put, so far as money is concerned, in that same position by damages for breach of that term of the contract. The judge has taken the view that the shippers promised to state truly in the bill of lading the date of shipment, and the respondents say that if that had been done they would have been entitled to reject the goods. By the breach of contract in sending forward a bill of lading containing a false statement, the plaintiffs say they have been deprived of that right. I suggested to the appellants that if their promise to tender a correctly dated bill of lading had been in a separate contract their contention would have been unarguable. It seems to me to make no difference that the term is in the same contract which contains the obligation to ship the sugar in September.

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Greer L.J.

I agree with Mr. Jowitt that the result of that is to give the plaintiffs in this case exactly the same damages as they would have received if they had successfully brought an action for fraudulent misrepresentation, but there may well be terms in a contract which, if broken, put the party complaining of the breach in the same position as if he claimed damages for false representation. That is the view that commends itself to my mind, although I must say not without some hesitation. The view we adopt may seem to be inconsistent with that of McCardie J. in *Taylor & Sons* v. *Bank of Athens* (1), but that case may be distinguishable, because there the claim taken to arbitration was not based upon a breach of contract in putting forward a bill of lading with a wrong date. The learned judge said (2): "The buyers went to arbitration upon their claim for breach of contract against the sellers. The arbitrators have rightly found that the sellers committed a breach of contract in not shipping the goods within the proper period." I agree that if no question were involved of a distinct breach of contract by tendering a wrongly dated bill of lading the position would be quite different, and Mr. Jowitt's argument convinces me that in those circumstances and in respect of such a claim nothing but nominal damages would be recoverable, and that would be in accordance with McCardie J.'s view.

There is a further point with which it is necessary to deal. I agree with Scrutton L.J. that once you get the position of the buyers, as I have stated it, it does not seem necessary to go further and consider the sub-contracts, because if the term of the contract as to tendering a true bill of lading had been performed there never would have been any question of having goods to use for the sub-contracts; but it is said that we must consider them for the purpose of minimizing the damages. Assuming, it is said, that the measure of damages is otherwise correct, still, the respondents having taken the goods must do their best to minimize the damages, and therefore they ought to have forced the sub-purchasers to take and pay for the goods, or to have sued the

(1) 27 Com. Cas. 142. (2) 27 Com. Cas. 143.

sub-purchasers for their refusal to take them. I think the sub-purchasers would have had no answer to the claim if it had been made, but the respondents were faced with the position that in order to recover from the sub-purchasers, and thus minimize the damage recoverable from the defendants, they would have had to embark on litigation in India. I see nothing immoral or unconscionable in an endeavour to hold to their bargain the Indian sub-purchasers who had bought goods on different terms from those on which the respondents bought them—namely, as goods which were certified by the bill of lading as having been shipped in September. The respondents would have been perfectly entitled, as a matter of business morals, to hold the sub-purchasers to their bargain and make them pay damages if they did not take the goods. But it is wholly unreasonable to say that that would be the ordinary course of business which they ought to pursue to diminish the damages. People have not to consider what is right in a strict court of conscience ; they have to consider the effect of their conduct upon their business relations with other people, and I have little doubt that it would not have suited the respondents' business, nor would it be reasonable as a matter of business to require them, to do what is suggested in order to diminish the damages, if prima facie they are entitled to recover damages from the defendants.

I have had the same difficulty as Scrutton L.J. in knowing the right way to reconcile the decisions in *Williams Bros.* v. *Agius* (1) and *Hall* v. *Pim* (*Junior*) *& Co.* (2), although I have little doubt that when the matter comes again before the House it will be able to reconcile these apparently irreconcilable decisions. I do not suppose that they are really irreconcilable. Fortunately in the present appeal we do not require to enter upon the discussion of those cases, and therefore I say nothing except this, that the judgment in *Hall* v. *Pim* (*Junior*) *& Co.* (2) commends itself to my mind as a reasonable and sound view of what ought to be the law on the subject of taking into account sub-contracts in estimating damages arising out of the principal contract.

(1) [1914] A. C. 510. (2) 33 Com. Cas. 324.

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For these reasons I agree that the appeal should be dismissed.

SANKEY L.J. I agree. By a contract on c.i.f. terms the respondents agreed to buy and the appellants to sell sugar for shipment from Java to Bombay. A c.i.f. contract is a contract for the sale of goods, but, as every one knows, there are certain specific documents which are part of that contract, one of them being a bill of lading, as to which there is an implied obligation that it shall be dated accurately. In this case, by some unfortunate circumstance, the bill of lading given was inaccurately dated. It was dated September 30, whereas the sugar was not shipped till October. No fraud is imputed to the appellants, and I assume that they are blameless in the matter; but it is admitted that they broke one of the fundamental conditions of the contract—namely, the condition or obligation to give an accurately dated bill of lading. As a result the respondents took the sugar, but they did not get what the defendants had contracted to give them. They got something different—namely, an October instead of a September shipment. One might illustrate the position by putting the case suggested during the argument of a man who, having purchased a pair of trousers, has a hat, instead of the trousers, sent to him. In this case what is the respondents' remedy, or rather, what is the measure of their damages? They sold what was delivered to them, although it was not the sugar that they had contracted to pay for or what the appellants contracted to deliver, but something different and of less value. Wright J. has held that the measure of damages is the difference between the sum which the respondents got for the sugar actually delivered to them and the price they paid for it under their contract with the appellants. I think that is right, and I think the measure of damages in a case like this is the difference between what the buyers have in fact paid to the sellers and the market price of the goods. This view is not in conflict with any of the earlier cases. In *Taylor & Sons* v. *Bank of Athens* (1) the cause of action was

(1) 27 Com. Cas. 142.

entirely different from that in the present case. Here the cause of action is for not having given what the contract gave a right to—namely, an accurately dated bill of lading. The one point that has pressed me throughout has been the question whether the respondents were under an obligation to minimize the damages in the way suggested by the appellants. That lets in the vexed point about the measure of damages, which most people thought had been finally laid to rest in *Williams Bros.* v. *Agius* (1), where Lord Haldane said this (2): "In the judgment delivered by Lord Esher"—that is in *Rodocanachi* v. *Milburn* (3)—"he laid down that the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as for instance a contract entered into by the plaintiff with a third party." Certainly the case of *Hall* v. *Pim* (*Junior*) *& Co.* (4) might appear to be in conflict with that. It is a case which, if I may quote the picturesque language of Mr. Le Quesne, has "astonished the Temple and surprised St. Mary Axe," but, I am not quite sure that that is correct when the ground upon which *Hall* v. *Pim* (*Junior*) *& Co.* (4) was decided is considered. That case, it seems to me, was decided upon its particular facts. For example, Lord Haldane said (5): "I think further that the contract and the conditions which it incorporates show that it was contemplated that the cargo might be passed on by way of subsale if the buyer did not choose to keep it for himself, and that the seller contracted to put the buyer in a position to fulfil his sub-contracts if he entered into them." Lord Dunedin says much the same. Lord Shaw said (6): "My principal reason is that I think that the two parties had actually provided for the very case of subsales which has caused these extra losses." Lord Phillimore put it even more strongly; he said (7): "The respondents as sellers must be taken to have consented to this state of things and thereby"—and this perhaps is the strongest expression—"to

(1) [1914] A. C. 510.
(2) Ibid. 520.
(3) 18 Q. B. D. 67.
(4) 33 Com. Cas. 324.
(5) Ibid. 326.
(6) Ibid. 332.
(7) 33 Com. Cas. 337.

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have made themselves liable to pay to the appellants their profit on a resale." Speaking for myself I am not at all sure that this could not have been said in *Williams Bros.* v. *Agius.* (1) *Hall* v. *Pim* (*Junior*) *& Co.* (2) appears to proceed upon the specific facts and the terms of the contract there under consideration. But even if that is not so, I do not agree with Mr. Jowitt that in this case the respondents were bound to sue their sub-purchasers and rely upon the conclusive evidence clause. I ventured to put to Mr. Jowitt in the course of the argument the question whether a person is entitled to refuse to plead the Statute of Frauds or the Statute of Limitations. But these cases are rather different. There the person would be refusing to rely upon a statutory enactment. In this case I do not think that it would be reasonable to ask the respondents to sue their sub-purchasers and to insist upon the conclusive evidence clause when by the hypothesis they had learned that the bill of lading was in fact untruly dated. The damage might have been minimized to this extent, that the Indian sub-purchasers would have had no defence; but a person is not obliged to minimize damages on behalf of another who has broken his contract, if by doing so he would, as I think might have happened here, have injured his commercial reputation by getting a bad name in the trade. In my opinion Wright J.'s decision was correct, and the appeal therefore must be dismissed.

Appeal dismissed.

Solicitors for appellants: *Ballantyne, Clifford & Co.*
Solicitors for respondents: *Sanderson, Lee & Co.*

(1) [1914] A. C. 510. (2) 33 Com. Cas. 324.

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Oct. 16, 17, 18, 19, 22; *Nov.* 20.

[1927. G. 103.]

Conspiracy—Breach of statutory Duty to supply Electricity—Acts done in bona fide intended Execution of statutory Duty—Damage through Non-supply of Electricity—Action not commenced within six Months—Public Authorities Protection Act, 1893 (56 & 57 *Vict. c.* 61), *s.* 1.

The plaintiffs, who carried on business in Stepney, were entitled, by statute and by contract, to receive from the Stepney Borough Council a supply of electrical power, but were deprived of this supply on certain days in May, 1926, when the general strike was in operation. In respect of this deprivation of supply the plaintiffs sued the defendants, who were the members of the Electricity Supply Committee of the Stepney Borough Council, to whom the Council had lawfully delegated the management of the electricity supply, alleging that the defendants had wrongfully and maliciously conspired and combined among themselves and with the London District Committee of the Electrical Trades Union to procure and induce the Borough Council, its servants and agents, to discontinue the supply of electrical power to the plaintiffs. The writ in the action was issued on January 13, 1927. The defendants denied the plaintiffs' allegations, and pleaded the Public Authorities Protection Act, 1893.

At the trial it was proved that at the end of April, 1926, when the general strike was threatened, the Government made preparations for the maintenance of essential services and offered to provide naval ratings to take the place of workers who might go on strike. The Government also issued an Emergency Order relieving the Stepney Borough Council from its obligation to supply the whole of the previous requirements of consumers of power by 50 per cent. The defendants did not accept the Government's offer of naval ratings to work the electricity plant, considering it unwise to do so in view of the likelihood of disorder in the borough; but they discussed the position with the Trades Union Council, and eventually resolved that if the union workers would continue the supply of light they would abandon the supply of power. The result of this was that the supply of power to the plaintiffs, as to all other occupiers of premises in the borough, was discontinued, whereby the plaintiffs suffered damage. The jury found that the defendants in making the agreement whereby power was not supplied to the plaintiffs were not acting in good faith and in the honest belief that they were carrying out their statutory duties, and that they were actuated by an indirect motive to injure the plaintiffs and to further the interests of those taking part in the strike. Upon these findings judgment was entered for the plaintiffs. The defendants appealed:—

Held, that there was no evidence to support the jury's findings.

Held, per Scrutton and Sankey L.JJ., and, *semble*, per Greer L.J., that

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as the acts and neglects complained of were done in purported execution of a statutory duty, the defendants were entitled to the protection of the Public Authorities Protection Act, 1893, and the action failed, as it was not commenced within six months of the acts and neglects complained of.

Held, per Greer L.J., and, *semble*, per Scrutton and Sankey L.JJ., that even if the action had been commenced within six months of the acts and neglects complained of, it was not maintainable against the defendants, the rule of law established in *Lumley* v. *Gye* (1853) 2 E. & B. 216 not being applicable in such circumstances.

Per Scrutton L.J.: To entitle a public authority to the benefit of the Public Authorities Protection Act, 1893, the acts or omissions complained of must have been done in the bona fide intended execution of a statutory duty. If, therefore, illegal acts are done from some motive other than an honest desire to execute the statutory or other legal duty and an honest belief that they are justified by statutory or other legal authority, for example, if they are done from a desire to injure a person or to assist some person or cause, without any honest belief that they are covered by, or are necessary in the execution of, statutory authority, the Public Authorities Protection Act, 1893, is no defence, for the acts complained of are not done in intended execution of a statutory duty, but only in pretended execution thereof. So, too, with regard to a default, namely, a simple omission to do something which the statute requires the public authority to do, the Act does not give protection if the default is the result of motives other than the desire and intention to perform the statutory duty; but a default in executing a statutory duty due to no positive motive or intention, but from forgetfulness or ignorance, is protected by the Act. In every case the onus of proof is on those alleging dishonest motives on the part of a public authority

APPEAL from a verdict and judgment in an action tried by Avory J. with a special jury.

The plaintiffs were a limited company carrying on business in the borough of Stepney, to whom the Stepney Borough Council were by statute and by contract under an obligation to grant a supply of electrical power. The defendants were the members of the Electricity Supply Committee, to whom the Council had lawfully delegated the management of the electricity supply in the borough.

The plaintiffs alleged that the defendants wrongfully and maliciously conspired and combined amongst themselves, and with the London District Committee of the Electrical Trades Union, to procure and induce the Borough Council and their servants and agents to discontinue the supply of electricity to the plaintiffs from May 4 until May 13, 1926, whereby the plaintiffs suffered damages which they put

at 1241*l.* 9*s.* 8*d.*, and which they claimed to recover from the defendants. The writ in the action was issued on January 13, 1927.

The defendants denied the alleged conspiracy, and said that the acts which they did (which were done during the general strike of 1926) were done by them bona fide as members of the Borough Council and Electricity Supply Committee and in the execution of their duties, and they said further that as the action was not commenced within six months of the act, neglect, or default complained of they were protected by the Public Authorities Protection Act, 1893.

The circumstances giving rise to the action are stated in detail in the judgments; shortly they were as follows:—

Under the Electric Lighting Act, 1882, and the Provisional Order granted by the Board of Trade under the Electric Lighting Acts to the Whitechapel Board of Works, duly confirmed by the Electric Lighting Orders Confirmation (No. 6) Act, 1892—see ss. 24 and 26—the Stepney Borough Council (which was substituted for the Whitechapel Board of Works by the Borough of Stepney Order in Council, 1900, made under the London Government Act, 1899) were bound to give and continue to give a supply of electrical energy to certain owners and occupiers of premises within the borough, among whom were the plaintiffs; and if the Borough Council made default in supplying energy to any owner or occupier of premises to whom they were required to supply energy they were liable to a penalty not exceeding 40*s.* in respect of every such default for each day on which the defaults occurred, but the penalties so imposed were not to exceed in the aggregate the sum of 50*l.* in respect of any default not being wilful default for any one day, and in no case was the penalty to be inflicted if the default was caused by inevitable accident or force majeure or was of so slight or unimportant a character as not materially to affect the value of the supply.

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The Stepney Borough Council was also by contract under an obligation to grant a supply of electrical energy to the plaintiffs.

The defendants, as the Electricity Supply Committee of the Stepney Borough Council, had by the by-laws of that body the control of all persons employed in connection with the supply of electricity and the appointment and dismissal of all foremen connected therewith.

At the end of April, 1926, a general strike was threatened, and the Government issued an Emergency Order relieving the authority of its obligation to supply the whole previous requirements of power by 50 per cent. In Stepney most of the subordinate electrical workers were members of the Electrical Trades Union, some of the superior officials being members of the Electrical Power Engineers Association. On May 3, 1926, the shop stewards of the Electrical Trades Union proposed to stop all work of their members both for the supply of light and power at midnight of that day. An emergency meeting of the Stepney Electricity Supply Committee was called and sat from 6.30 P.M. till midnight. Major Attlee, the chairman, saw the official of the Trades Union Council, who desired at that time to maintain lighting, but said that all power must be shut down. The Electrical Trades Union, however, for some time declined to continue lighting. After a long discussion the Electricity Supply Committee decided that if the Electrical Trades Union would continue to supply lighting, they, the committee, would abandon the supply of power, and that, as power and lighting were supplied from the same mains they would, to secure lighting, cut off the supply of any one who used power. This arrangement was carried out, the supply of power was cut off from all consumers, whoever they were, the plaintiffs among them. The defendants declined to accept the Government offer to supply naval ratings to work the power stations, their reason for refusing being that if naval ratings and other volunteers were introduced it would, in their opinion, lead to disorder, and they thought it better to carry on as much as they could without disorder by abandoning the supply of power. By reason of the defendants'

decision the plaintiffs did not obtain a supply of power for several days.

At the trial Avory J. left certain questions to the jury, which, with their answers, were as follows :—

" (1.) Did the defendants, other than Hurley and Oliver [against these two the plaintiffs withdrew their claim] agree amongst themselves and with the committee of the Electrical Trades Union to discontinue the supply of electricity to the plaintiffs' premises ?—Yes.

" (2.) Did the defendants in pursuance of their agreement cause such supply to the plaintiffs' premises to be discontinued ?—Yes.

" (3.) Did the plaintiffs suffer damage in consequence ? —Yes.

" (4.) Were the defendants in doing what they did acting in good faith and in the honest belief that they were carrying out their statutory duty ?—No.

" Or were they actuated by any indirect motive to injure the plaintiffs ?—Yes.

" Or to further the interests of those who were taking part in the general strike ?—Yes."

Upon these findings Avory J. entered judgment for the plaintiffs for 350*l.* agreed damages.

The defendants appealed.

Hon. Sir Malcolm Macnaghten K.C. and *Hubert Hull* for the appellants. This action is not maintainable against the appellants. If they, as the members of the Electricity Supply Committee of the Borough Council, refused to supply electrical energy in accordance with the obligation of the statute, the body liable to a writ of mandamus would be the Council and not the Committee. If a third person interfered with the supply without just cause or excuse he would be liable on the principle of *Lumley* v. *Gye* (1); but that principle does not apply to the agent of a principal, or a member of a corporation, where the principal or the corporation is the party charged with the duty, performance of which has been interfered with: *Said* v. *Butt.* (2)

(1) (1853) 2 E. & B. 216. (2) [1920] 3 K. B. 497.

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Even if, however, the action could have been maintained, if it had been commenced within six months of the acts complained of, the fact that it was not so commenced is fatal to the respondents in view of the provisions of the Public Authorities Protection Act, 1893. The duty of the appellants as members of the Electricity Supply Committee was to think, speak and act according to the best of their judgment and ability. In the circumstances which occurred they had alternative courses open to them: one, to obtain outside help, with the danger of aggravating the discontent in the borough, and precipitating a riot; the second, by some means or other to induce the Electrical Trades Union to abandon their unlawful action. Mere persuasion was futile. They took the only course that could, in the circumstances, have had any effect. They persuaded the strikers to supply light upon the terms that they should not be compelled to supply power. There is no evidence that in doing this they were actuated by any motive except an honest desire to take the safest means of escape from a dangerous situation. To enable the respondents to maintain their action, notwithstanding the lapse of more than six months from the date when the acts complained of occurred, they had to establish that the appellants acted maliciously, and not as members of the Committee: *Newell* v. *Starkie* (1), and this they failed to establish. There was thus no evidence to support the findings of the jury to the fourth question. The verdict was perverse and such as no twelve reasonable men could find.

Sir Walter Greaves-Lord K.C. and *Lipsett* for the respondents. By s. 19 of the Electric Lighting Act, 1882, the Council was under an obligation to supply electricity to the respondents for all purposes; the appellants, as the agents of the Council, so far from carrying out this statutory duty, made an agreement with outside persons that they would not do so. The jury was entitled to come to the conclusion that the appellants were unwilling to do anything that would impede the general strike, and that they acted with intent to injure the respondents.

(1) (1919) 83 J. P. 113.

They must have known that to deprive the respondents of their statutory right to the supply of power was to injure them. The action was therefore clearly maintainable, and neither the Public Authorities Protection Act, 1893, nor s. 265 of the Public Health Act, 1875, affords an answer. There was no "neglect or default," there was a refusal to act. The case is very different from *Selmes* v. *Judge*. (1)

[SCRUTTON L.J. The distinction is between using and abusing statutory authority, or between intending and pretending to act under it. Non-feasance may come within the Act: *Jolliffe* v. *Wallasey Local Board*. (2)]

No doubt the Public Authorities Protection Act, 1893, protects a man who acts in a bona fide and reasonable belief in a state of facts which, if true, would give him a right to do as he does: Halsbury's Laws of England, vol. xxiii., p. 343, s. 695; but in no case has protection been accorded to one who knows he was doing a wrongful act. When knowledge of the illegality is proved bona fides does not purge it: *South Wales Miners Federation* v. *Glamorgan Coal Co.* (3) and *Sorrell* v. *Smith*. (4) If a managing director of a company which supplied electricity should give a direction that the fuse of a rival company should be drawn, he would be liable; and so would his co-directors who concurred in the direction. And if they advised the company to break a contract, which the company had made with a consumer, on the ground that it was an unprofitable one, they would be liable notwithstanding that they were in the position of advisers to the company. There is no material difference between the position of directors of a trading company and members of a committee of a council, so far as this case is concerned.

The only remedy which the respondents have against the Council is for penalties under the special Act: *Atkinson* v. *Newcastle Waterworks Co.* (5) and *Clegg, Parkinson & Co.* v. *Earby Gas Co.* (6)

(1) (1871) L. R. 6 Q. B. 724.
(2) (1873) L. R. 9 C. P. 62, 81.
(3) [1905] A. C. 239.
(4) [1925] A. C. 700.
(5) (1877) 2 Ex. D. 441.
(6) [1896] 1 Q. B. 592.

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[*Clothier* v. *Webster* (1) and *Lyles* v. *Southend-on-Sea Corporation* (2) were also referred to.]

Hon. Sir Malcolm Macnaghten K.C. in reply. The members of the Committee, acting as such, cannot in law procure either a breach of a contract made by the Council or a breach of a statutory duty imposed upon the Council. That being so, they cannot conspire to do such a thing. If the respondents' view is correct the appellants may be liable in excess of the amount for which the Council would be liable. Under the Public Authorities Protection Act, 1893, it was for the respondents to show that the appellants in doing what they did were not acting bona fide, and no evidence was before the jury that the appellants were actuated by malice or any improper motive. They are therefore entitled to the protection of the Act.

Cur. adv. vult.

Nov. 20. The following judgments were read:—

SCRUTTON L.J. From May 3 to May 12, 1926, Messrs. G. Scammell & Nephew, Ld., the present respondents, were not supplied by the local authority with electrical power to which they alleged they had a statutory right. On January 13, 1927, Messrs. Scammell issued a writ in respect of such failure to supply. The Stepney Borough Council were the statutory authority for the supply of electricity, but the writ was not issued against the Council. It was issued against those of the individual members of the Electricity Supply Committee of the Council who were members of the Labour Party, a party which was in the majority in the Council and the Electricity Committee. The Council had, as it legally might, delegated the management of the electricity supply to the Committee, who were under no obligation to obtain the approval of the Council for their acts. I deal later with the exact form of the writ and claim against the members of the Committee. The individual members sued replied that as the writ was issued more than

(1) (1862) 31 L. J. (C. P.) 316. (2) [1905] 2 K. B. 1.

six months after the matters complained of, they were protected by the Public Authorities Protection Act, as what was complained of was really either something done as members of the Electricity Committee in intended execution of a statutory authority or duty, or was a neglect or default in the execution of the statutory authority and duty. The learned judge who tried the case with a special jury left to them three sub-questions on this point: "Were the defendants in doing what they did acting in good faith and in the honest belief that they were carrying out their statutory duty? Or were they actuated by an indirect motive to injure the plaintiffs? Or to further the interests of those who were taking part in the general strike?" And the jury answered all of them against the defendants. The learned judge thereupon gave judgment for the plaintiffs for agreed damages. The defendants appeal.

The Public Authorities Protection Act, 1893, is wanted only if the acts complained of are illegal. It may be an answer to the action that those acts were legal, or gave no cause of action; but it is unnecessary to consider this, if, though the acts were illegal, they are acts in respect of which an action can only lie if brought within the statutory limit of time, in this case six months next after the act, neglect or default complained of. To require the application of the Public Authorities Protection Act, the acts must be acts not authorized by any statute or legal justification, but acts intended to be done in pursuance or execution of some statute or legal power. It would appear, therefore, if illegal acts are really done from some motive other than an honest desire to execute the statutory or other legal duty and an honest belief that they are justified by statutory or other legal authority; if they are done from a desire to injure a person or to assist some person or cause, without any honest belief that they are covered by statutory authority, or are necessary in the execution of statutory authority, the Public Authorities Protection Act is no defence, for the acts complained of are not done in intended execution of a statute, but only in pretended execution thereof. In the same way

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as to "defaults" which in my view cover simple omissions to do something which is required by statute to be done, if it can be proved that the default is the result of the motives or intentions specified above, motives other than the desire and intention to perform statutory duty, the Act would not give protection. But a default in executing the statute from no positive motive or intention, but from simple forgetfulness or ignorance, would not lose the protection of the statute. In my opinion this represents the law, though there is not at present much direct case authority for it. In *Newell* v. *Starkie* (1), an Irish appeal to the House of Lords, the plaintiff alleged that the defendant did certain acts, apparently in executing a statute, "maliciously," but gave no evidence of malice, treating the defendant as having the burden of proving that he acted in performance of a statutory duty. All the members of the House agreed that in the acts complained of, being apparently acts in the execution of statutory duty, there was no evidence on which a question could be left to the jury whether the defendant acted maliciously, and therefore outside the protection of the statute; but Lord Finlay went on to say what was presumably not necessary for the decision (2): "The second observation I have to make is that the Act necessarily will not apply if it is established that the defendant had abused his position for the purpose of acting maliciously; in that case he has not been acting within the terms of the statutory or other legal authority; he has not been bona fide endeavouring to carry it out. In such a state of facts he has abused his position for the purpose of doing a wrong, and the protection of this Act, of course, never could apply to such a case."

In *Selmes* v. *Judge* (3) surveyors of highways made a rate of an amount not authorized by any Act. Blackburn J. said (4): "Here the defendants were surveyors of highways, elected under 5 & 6 Will. 4, c. 50. It is probable that they did not know what was the Act under which they were appointed; but assuredly they intended that everything

(1) (1919) 83 J. P. 113.
(2) Ibid. 117.
(3) L. R. 6 Q. B. 724.
(4) Ibid. 727.

which they did as surveyors of highways should be done under the authority of the statute under which they were appointed. . . . . The judge thought that the defendants were not acting under the 5 & 6 Will. 4, c. 50, and that consequently they were not entitled to the notice of action allowed thereby. I agree that if a person knows that he has not under a statute authority to do a certain thing, and yet intentionally does that thing, he cannot shelter himself by pretending that the thing was done with intent to carry out that statute." The defendants were there protected, though they had done a thing unauthorized by any Act, and did not know the terms of any Act authorizing the act they did, because they honestly thought they were carrying out some statutory duty.

Again in *Cross* v. *Rix* (1) Ridley J. said, obiter, "there was an issue of fact as to whether the defendant's actions were done bona fide in pursuance of a public duty, or were done out of malice or spite," which must be determined to see whether the Public Authorities Protection Act applied.

In my opinion, when a defendant appears to be acting as a member of a public body under statutory authority and pleads the Public Authorities Protection Act, the plaintiff can defeat that claim by proving on sufficient evidence that the defendant was not really intending to act in pursuance of the statutory authority, but was using his pretended authority for some improper motive, such as spite, or a purpose entirely outside statutory justification. When defendants are found purporting to execute a statute, the burden of proof in my opinion is on the plaintiffs to prove the existence of the dishonest motives above described and the absence of any honest desire to execute the statute, and such existence and absence should only be found on strong and cogent evidence.

The appellants here allege that there is no evidence on which a jury properly directed could find the existence of such motives. It becomes necessary therefore to state the facts proved in evidence.

(1) (1912) 29 Times L. R. 85.

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Under the Electric Lighting Act, 1882, and the Whitechapel District Electric Lighting Order, 1892, ss. 24 and 26, the Borough Council of Stepney are bound to supply to certain owners or occupiers, among whom were the plaintiffs, electricity for power and lighting, and are subject to certain penalties for failure to supply, limited, unless the default is wilful, and not to be inflicted if the default was caused by inevitable accident or force majeure, a very unfortunate phrase in my opinion to be used in an English statute. At the end of April, 1926, a general strike was threatening; the Government was making preparations to endeavour to maintain essential services, of which the supply of electricity was one. These preparations included the supply of men, volunteers and naval ratings, to replace the men on strike. The Stepney Electricity Committee, of which Major Attlee was chairman, had continued these preparations by making arrangements for the supply of oil instead of coal, and provisions and bedding so that workers might stay on the premises. The Government themselves were sufficiently doubtful of their power to maintain this service as to issue at the end of April an Emergency Order relieving the authority of its obligation to supply the whole previous requirements of consumers as to power, and cutting down the possible requirements by 50 per cent. In Stepney most of the subordinate electrical workers were members of the Electrical Trades Union, or E.T.U., a body not distinguished by its moderation or its law-abiding character. Some of the superior officials were members of the Electrical Power Engineers Association (E.P.E.A.). In the afternoon of Monday, May 3, the shop stewards of the E.T.U. proposed to stop all work of their members both for the supply of light and power at midnight that evening. This would mean complete darkness in a large and poor district of the East End, inhabited by numbers of aliens and undesirable characters, unless the men going out could be persuaded to stay in, or replaced by men suitable to work very valuable plant. In the latter case there was at any rate a possibility of violence being used by the strikers as a form of "peaceful persuasion"

of men whom they considered "blacklegs." An urgency meeting of the Committee was called, and sat, with intervals while other bodies were being consulted, from 6.30 P.M. to midnight. The E.T.U. said they had orders to stop all work at midnight. They were specially angry with the E.P.E.A. who were ready to work for the supply of light, and some, not all, power, with volunteers, though they deprecated their introduction. Major Attlee went and saw the Trades Union Council, who desired at present to maintain lighting, but said that all power must be shut down. The E.T.U., however, declined for some time to continue lighting. After long discussion the Electricity Committee decided that if the E.T.U. would continue lighting, the Committee would abandon the supply of power, endeavouring, however, to arrange its supply to hospitals, and that as power and lighting were supplied from the same mains, they would, to secure lighting, cut off the supply of any one who used power. The exact resolutions are: "The Committee were of opinion that, in the interest of the undertaking and with a view of preventing disorder, ensuring public safety and endeavouring to maintain peace, the most desirable course to adopt would be to support the decision of the Trades Union Congress, supplemented, if possible, by securing the continuance of the supplies of power to hospitals and like institutions, it appearing that any further efforts to obtain greater facilities would be abortive. Resolved accordingly. The Committee were further of opinion, having regard to the consideration referred to above, that the fuses on the premises of any person or firm found using current for power purposes should be drawn. Resolved accordingly."

The Committee, as will be seen, were securing the continuance of electric lighting, which it was their duty to supply, by abandoning the half supply of power from which the Government had not excused them, and thus securing the continued working of the present staff. The weak point of their decision was that they did not communicate with the Government to ascertain what men and what protection for them the Government could afford. Their stated reason for

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this was that they thought the introduction of volunteers and possibly armed forces to protect them was very likely in that district to lead to disorder, and they thought it better to carry on as much as they could without disorder by abandoning the rest of their duty.

I am aware that I am speaking after the event, but I think they made a mistake in not ascertaining what the Government could do, and I suspect that Major Attlee is not very proud of the fact that Stepney under his leadership was the only London authority that did not carry on power and light. But a mistaken view that lighting could be obtained and disorder saved only by sacrificing power and giving way to threats of violence is one thing; the Government were prepared to sacrifice half the power supply and get the rest. A finding that the long Committee meeting and interviews were only a pretence of statutory duty, and were really a dishonest attempt to help the strike under the guise of fighting it, is quite another thing; and the question is whether there is any evidence that the latter is the true view, the duty of supplying such evidence being on the plaintiffs.

The learned judge on this point asked these questions under head 4, and the jury answered them all against the defendants. The second question was "were they actuated by any indirect motive to injure the plaintiffs," and the jury said "Yes." I cannot see any evidence of any personal feeling against the plaintiffs, or indeed on May 3, of any knowledge of the plaintiffs' existence.

All consumers were cut off power whoever they were, and there was no intention to deal with the plaintiffs in any way other than that in which every consumer of power was dealt with. It is true that afterwards when the plaintiffs were thought to be using power from the mains, the officers of the Electricity Committee disconnected them, but this again was only as one of a body of consumers all of whom were to be treated in the same way.

Counsel for the plaintiffs argued that as the result of the decision was to injure the plaintiffs, the defendants must be taken to have intended to harm them. This view would

destroy the effect of the Public Authorities Protection Act in every case in which the acts complained of did in fact injure the plaintiffs, and is I think quite untenable. This finding of the jury is so destitute of foundation as to be perverse, and throws great doubt on their other findings. These are that the defendants were not acting in good faith and in the honest belief that they were carrying out their statutory duty, but were acting to further the interests of those who were taking part in the general strike. This finding, which is one of dishonest pretence, was come to though counsel for the plaintiffs began his address to the jury: "You are not here trying the question whether Major Attlee is a dishonest person or not, no one has ever suggested that he is." I do not think there was any evidence on which the jury could find that the members of the Committee were not intending to carry out their statutory duty, when they determined to get a supply of light by sacrificing a supply of half the power, the Government having abandoned the other half, and as they thought to avoid disaster by working the supply with their present men. I think they made a mistake in not at any rate making more inquiry about the Government supply of men and protection, and very likely they showed a lack of courage. But mistakes and weak action may well be made in the intended execution of the statute, without dishonesty or lack of good faith. The necessity for action was urgent, the risks of danger serious, and the Committee took a view that they could best perform part of their duty by abandoning part. I may disapprove their decision without convicting them of dishonest pretence of which I see no evidence.

The strongest way of putting the case against them is to say, as was said: "You knew you had a duty to supply half the power requirements, you did not do so, and you knew that was illegal." I think this overlooks the consideration that "power" was only part of their duty; they had to supply lighting as well, and they were threatened with stoppage of lighting. They determined to secure their supply of lighting by abandoning half the supply of power. The same argument

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might be raised, if owing to a coal strike they could only get half the necessary supply of coal, and determined either to supply no power, or only a rateable supply amongst consumers, or only a supply to consumers in essential industries. It might still be said: "But you knew you were not supplying A. and that it was illegal not to supply him, and you had coal enough to supply A." Their decision would still be a bona fide attempt to execute their statutory duty.

I think therefore there was no evidence on which the jury could find the acts or omissions complained of were not in the bona fide intended execution of a statutory duty. It is true they were also breaches of contract. I have carefully considered the judgments of the House of Lords in *Bradford Corporation* v. *Myers* (1) and of this Court in *Lyles* v. *Southend Corporation* (2) and *Edwards* v. *Metropolitan Water Board* (3), and I think the acts or defaults in this case are in purported execution of a statutory duty, though they may also be breaches of a contract. The case is like the *Southend* case (2), where the contract and the statutory duty are the same, and the claim is not made any better by being disguised as procuring the authority to break a contract. The agent of the authority who has power to act without consulting the authority acts in purported execution of the duty and does something illegal; complaint must be made of it by writ issued within a certain time of the acts or defaults complained of. That has not been done, and the action therefore fails.

I should add that if I were wrong in this view I should be of opinion that there must be a new trial on the ground of misdirection. An unfortunate passage on p. 47 of the transcript of the summing up in my opinion leaves the jury free to consider a matter which may have materially influenced their decision, but which was clearly not evidence against the defendants, and which the jury should have been instructed to disregard entirely. During the strike the plaintiffs' manager had a conversation on the telephone with

(1) [1916] 1 A. C. 242. (2) [1905] 2 K. B. 1.
(3) [1922] 1 K. B. 291.

a person who he was told was a Mr. Young, an assistant engineer of the Borough Council. Mr. Hood Barrs in a letter to the Council said that Mr. Young told him "that the Council were taking their orders from the E.T.U." A letter from the Council said that Mr. Young denied that he said this, and asserted that he said he was taking his orders from the Electricity Supply Committee. This was clearly not evidence against the defendants; Young was not their agent to make admissions. But the learned judge, who I am sure would ordinarily be quite clear as to the inadmissibility of this evidence, read the letters to the jury with a statement that counsel had said very little about them (in which course I think counsel were quite right), and wound up "there the matter rests with regard to that." I think this was clear and substantial misdirection, and that the jury should have been told to disregard this incident entirely. I think also the passage at the bottom of p. 45 of the transcript of the summing up was unfortunately ambiguous, as the jury might understand that if the effect of the letter and action was "to play into the hands of" the strikers, the defendants might be liable though their honest intentions were different.

I am of opinion therefore that the defence of the Public Authorities Protection Act succeeds and judgment should be entered for the defendants with the statutory consequences as to costs, which we have unfortunately no power to vary.

This renders it unnecessary to consider finally whether the facts complained of would have given a cause of action against the defendants if the action had been brought within the six months. My present impression is they would not: (1.) Having considered the judgments in *Atkinson* v. *Newcastle Waterworks Co.* (1), especially the judgment of Lord Cairns, and in *Groves* v. *Lord Wimborne* (2), I think that no action for damages would lie against the Council for non-supply; the remedy would be the penalties which the Court might order to be paid to the complainant.

(2.) I do not think force majeure would afford any defence to the claim for penalties, in view of the defendants'

(1) 2 Ex. D. 441. (2) [1898] 2 Q. B. 402.

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failure to endeavour to use the Government resources and protection.

(3.) If an action for damages would not lie against the Council, I do not think it would lie against the members of the Council or Committee who sanctioned the acts or defaults complained of, and the action would not be made any better by disguising it as an action for inducing the Council to break its contract. But it is not necessary to express a final opinion on these points.

The appeal must be allowed and judgment entered for the defendants with the statutory consequences as to costs here and below.

GREER L.J. The appellants are certain members of the Electricity Committee of the Stepney Borough Council. The respondents are a company carrying on business as engineers at Fashion Street in the said borough. The appellants appeal against the verdict and judgment given against them in an action tried before Avory J. and a special jury. They allege that they are entitled to have the verdict and judgment set aside, and judgment entered for them on the ground that there was no evidence of any facts sufficient to establish liability in respect of the cause of action on which the respondents' claim was based, and in the alternative they ask for a new trial on the ground of misdirection.

In order to deal satisfactorily with the question involved in the appeal it is necessary to state the facts with some detail.

As undertakers pursuant to the provisions of the Electric Lighting Orders Confirmation (No. 6) Act, 1892, the Borough Council of Stepney were under obligation to give and continue to give to the respondents a supply of electric energy at their premises in Stepney. Under statutory powers in that behalf the Borough Council delegated to the Electricity Committee the management of their electricity undertaking, and did not require that their proceedings should be confirmed. The respondents by their statement of claim alleged that they had suffered damage by reason of a conspiracy between

the appellants inter se, and between them and the London District Committee of the Electrical Trades Union to cause and induce orders to be given to the Council their servants and agents unlawfully to discontinue the supply of electricity afforded to the respondents by the Council. They further alleged that in pursuance of such conspiracy the appellants wrongfully and maliciously caused and induced the Council to discontinue the supply from May 4 to May 13, 1926, which the respondents had received under the said Order and in accordance with a contract dated February 13, 1924, made between the respondents and the Council. The damage claimed was in respect of the loss of electricity between those dates. It will be observed that though a good deal was made at the trial and in the argument before us about the withdrawal of the fuse by the Council's servant on May 6, this is not relied on in the statement of claim as a separate and distinct cause of action, and though it is mentioned in the respondents' particulars as an act done in pursuance of the conspiracy, it is quite plain that it is not put forward as in itself a cause of action. It appears also from the evidence of Mr. Hood Barrs, the respondents' managing director, that before the main fuse was drawn by the Council's servant, the respondents had disconnected their internal wiring from the main and connected it with the engine they had installed to make their own electricity, and that the withdrawal of the fuse was of no consequence, as the Council's station was not operating at all by day, and the respondents did not use electricity by night. It seems to me that the respondents' claim must be treated as solely based on the failure of the supply of electricity by day, and unless there was evidence that this failure was due to an actionable conspiracy to which the appellants were parties, the verdict and judgment cannot stand. The case, in my judgment, entirely turns on what happened on the night of May 3.

On that day the Council of the Trades Union Congress declared a general strike to commence at midnight. The technical employees of the Council were members of a union known as the E.P.E.A. The great bulk of their employees

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in the electrical department were members of a union known as the E.T.U., who were governed by a district committee, and were affiliated to the Trades Union Congress. It became obvious to those whose duty it was to manage the electrical undertaking on behalf of the Council that there was grave danger of their men ceasing work at midnight, with the result that the borough and the adjoining borough of Bethnal Green, which their undertaking also served, would be plunged in darkness. Accordingly a meeting of the Electricity Committee was summoned by telegram to decide what was the best course to take in this grave emergency. All the appellants were persons politically in sympathy with the Labour Party, but four of the members who attended the meeting and allowed the resolutions to pass without protest, as apparently unanimous decisions, are equally responsible for the consequences which followed on the decisions of the Committee. The appellant, Attlee, who was chairman of the Committee, in consultation with the engineer, arranged before the meeting for bedding and food to be available to the workers in case of need. What took place at the meeting appears from the minutes which were put in as part of the respondents' case. The following further material facts were proved by witnesses for the respondents: (1.) that on the night of May 3 Major Attlee tried to persuade the men not to strike, but to continue the supply of electricity for all purposes; (2.) that when they refused, he tried to get the Trades Union Congress to order the district committee to tell the men to continue to work for all purposes; (3.) that, as he was unable so to secure a continuance of work for all purposes, and thought that the peace and good order of the borough would be gravely endangered if naval ratings and volunteer labour were introduced, he proposed the resolutions that were proposed and agreed to, as the best that could be done under the circumstances to secure without disorder the continued lighting of the Council's area of supply; (4.) that the Council's area contains a larger proportion of foreign born residents than any other part of London, and it includes part of the docks; (5.) that the fear of disorder if naval ratings

and volunteers were called in which influenced the Committee, was shared by the Deputy Town Clerk; (6.) that if they had applied for a supply from Poplar the supply would have been inadequate; (7.) that on May 4 and 5, notwithstanding the resolutions, Major Attlee, on behalf of the Committee, endeavoured to get the men to agree to supply power as well as light, and they would not; (8.) that Major Attlee endeavoured to get a supply for the hospitals, but he and Lord Knutsford only managed to get a supply for the London Hospital through Poplar; (9.) that a larger proportion of the Stepney Council's men were E.T.U. men than in any of the neighbouring corporation electrical works. It is therefore right to say that it was proved by the evidence called by the respondents, that Major Attlee and his Committee wanted the supply to continue for power as well as light, and it was only when they could not get it without calling in naval ratings and volunteers that they consented to do without it, and agreed with the E.T.U. that it was not to be supplied. Against this express evidence there is no weight to be attached to the fact that in order to induce the men to consent to work for light Major Attlee used an argument ad hominem by pointing out that refusing to supply electric light for lighting would not further the ends of those who had initiated the general strike.

The respondents also relied on evidence which was called with reference to what happened in other London districts. It was proved by a witness named Lee that the Ministry of Transport had made arrangements to supply naval ratings and volunteers sufficient to run all the generating stations and sub-stations, and that if an application had been made by Stepney, sufficient men could have been found to work the Stepney generating stations and keep them running for the supply of power as well as light, and he and other witnesses proved that a sufficient supply of electricity for power as well as light was provided in the London stations other than Stepney, and that Stepney was the only place in the London district in which during the strike electricity ceased to be supplied for power.

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The respondents also relied upon the fact that on May 5 Major Attlee, on behalf of his Committee, applied to the London District Secretary of the Trades Union Congress for a permit to run the Limehouse generating station during the daytime for the supply of energy to the hospitals, maternity homes, etc., but failed to get such permit except for the London Hospital, the claims of the hospital being powerfully urged on the trades union by Lord Knutsford.

It was submitted at the end of the respondents' case that there was no evidence to go to the jury, but the learned judge ruled against this submission.

Only two witnesses were called by the appellants, a Mr. Woodhams, who proved that he was on the Council and was a member of the Committee but not in sympathy with the Labour Party, and the chairman, Major Attlee. The former witness gave evidence that no member of the Committee objected to the resolutions proposed by the chairman, giving as an explanation the fact that he knew the majority would be with the chairman, and it was no use challenging the vote. His evidence does not, in my judgment, in any way weaken the evidence given on behalf of the respondents that the decision of the Committee was unanimous. The members of the Committee who took no objection to the resolutions, and allowed them to be passed without any sign of dissent, could not, in my judgment, escape such responsibility, if any, as attaches to the other members of the Committee.

In giving evidence for the appellants, Major Attlee justified their action on the grounds that the Committee acted as they did because they thought the course they took was in the best interests of the borough, as it thereby secured the continued lighting of the borough, and the maintenance of peace and good order. It was suggested by the respondents' counsel that the jury were the best judges as to whether Major Attlee's manner of giving evidence supported his denial of the respondents' allegations against him. But if a plaintiff gives no evidence in support of his case the fact that a defendant's denial is not entirely satisfactory cannot

be used as proof of propositions of which the plaintiffs have failed to give any evidence.

After the conclusion of the evidence, counsel for the respondents, in addressing the jury, used these words: "You are not here trying the question whether Major Attlee is a dishonest person or not, no one has ever suggested that he is. What you are trying is the question whether Major Attlee and the other members of his Committee were acting in the intended execution of the statutory duty cast upon them by Parliament. . . . . Members of the jury, the question here is: did these people do what was illegal? You must presume it. My learned friend has said that discretion is the better part of valour. I suppose that is what each one of them was thinking when in answer to the interrogatories which were administered in this case he said he objected to answer because the answer might tend to incriminate him. Members of the jury, it is only in that sense that they were consciously doing that which was illegal; all the other things go by the board once you get that position. It is no case for heroics or anything of that sort, it is just the simple every-day proposition which has to be dealt with by our law, not whether Major Attlee is a dishonest man—we know he is not—not whether he is a man who is going to be prejudiced by any political views, nothing of the kind, there is no question of prejudice involved in this case."

The learned judge left the following questions to the jury, and the answers to the questions are as stated: "(1.) Did the defendants other than Hurley and Oliver agree amongst themselves and with the Committee of the Electrical Trades Union to discontinue the supply of electricity to the plaintiffs' premises?" To which the jury reply, "Yes." "(2.) Did the defendants in pursuance of their agreement cause such supply to the plaintiffs' premises to be discontinued?" To which the jury reply, "Yes." "(3.) Did the plaintiffs suffer damage in consequence?" To which the jury reply, "Yes." "(4.) Were the defendants in doing what they did acting in good faith and in the honest belief that they were carrying out their statutory duty? Or were they actuated

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by an indirect motive to injure the plaintiffs ? Or to further the interests of those who were taking part in the general strike ? " This last question (4.) was divided into three questions, and the jury replied " No " to the first, " Yes " to the second, and " Yes " to the third.

It is quite clear that there was no evidence which would justify the jury's answer to the fourth question, that the appellants were actuated by an indirect motive to injure the respondents. There was no evidence that they knew anything about the respondents, or had any reason whatever to desire to injure them. I am also of opinion that there was no evidence that they took the course they did to further the interests of those engaged in the general strike. I have already pointed out that it was proved by the evidence called by the respondents that Major Attlee, acting on behalf of his Committee, endeavoured to persuade the men on the district committee of the union, and the committee of the Trades Union Congress, to continue the normal working of the stations, and it was only because they failed in doing so, and could only get the men to continue the work for the supply of light, that they agreed not to supply electricity for power. The only point at which blame can be attached to them is in respect of their want of courage, or want of confidence, in the safe use of the alternative supply of labour that might have been available if they had applied to the Ministry of Transport. It is easy to blame them for their mistaken judgment with regard to the dangers that would have arisen if they had done so. They had to make up their minds at a late hour on May 3 in order to ensure the lighting of the borough on that night, and I cannot see in this case any evidence, that, in coming to the decisions recorded on the minutes, they did other than that which they believed to be in the best interests of their borough. I think the questions in this case must be determined without regard to the jury's findings in answer to the several questions involved in the fourth question, as framed by the learned judge. The question for decision then resolves itself into this : are the appellants liable to the respondents for damages for conspiracy merely because the

carrying out of their resolutions necessarily resulted in the failure of the corporation to supply electricity, as provided by statute? It is, I think, clear that the corporation itself could not have been sued for the damages arising from such failure of supply: see *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (1) and *Clegg, Parkinson & Co.* v. *Earby Gas Co.* (2) It would be strange indeed if a committee to whom the management of the electricity department of the borough was committed could be held liable for conspiracy to cause the corporation to do something for which no liability to damages has been imposed on the corporation. But it is said that the appellants are liable on the rule of law established in *Lumley* v. *Gye* (3), inasmuch as they caused or persuaded the servants of the corporation to do that which was in fact illegal. For reasons which are stated at length by McCardie J. in *Said* v. *Butt* (4) I am of opinion that no such action will lie. There is no instance of any such action having been brought except in the case of *Said* v. *Butt.* (4) In that case, after pointing out the difficulties of applying the *Lumley* v. *Gye* (3) principle to the case of a servant or agent on behalf of his principal breaking a contract made with that principal, McCardie J. says (5): "I hold that if a servant acting bona fide within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken. I abstain from expressing any opinion as to the law which may apply if a servant, acting as an entire stranger, or wholly outside the range of his powers, procures his master to wrongfully break a contract with a third person. Nothing that I have said to-day is, I hope, inconsistent with the rule that a director or a servant who actually takes part in or actually authorizes such torts as assault, trespass to property, nuisance, or the like may be liable in damages as a joint participant in one of such recognised heads of tortious wrong. This

(1) 2 Ex. Div. 441.
(2) [1896] 1 Q. B. 592.
(3) 2 E. & B. 216.
(4) [1920] 3 K. B. 497.
(5) [1920] 3 K. B. 506.

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point was incidentally dealt with by the Court of Appeal in the recent case of *Belvedere Fish Guano Co.* v. *Rainham Chemical Works.*" (1)

It was suggested in argument in this case that the appellants were in fact not acting as a committee managing the Council's business, but were in the same position as strangers acting wholly outside the range of their powers. I think there was no foundation for this contention. They were called together to deal with a question with regard to the management of the electricity supply, and what they did they did as representing the corporation in the management of the supply. It is true that Major Attlee admitted that the result of their action would be that there would thereby be caused a breach of the public statutory duty of the corporation to continue to give the respondents a supply of electricity, but in my judgment under the circumstances of the present case, the fact that the appellants knew that that would be the result of their action does not make them guilty of an illegal conspiracy actionable at the suit of the respondents.

If this opinion is correct it is unnecessary to consider the protection afforded by the Public Authorities Protection Act, but if I should be wrong in holding that there was no cause of action, the question whether they are so protected would arise. In my judgment they would be so protected, because they were acting in intended execution of the Stepney Electricity Order, inasmuch as they were endeavouring to secure a continuance of the supply of electric light for their borough, and they were also acting in intended execution of their public duty as members of the Council and representatives of the people of the borough. I do not think it follows from the fact that they knew that the necessary result would be that the corporation would be involved in an illegality would prevent the application of s. 1 of the Public Authorities Protection Act, 1893. In *Selmes* v. *Judge* (2) Blackburn J. said (3): "I agree that if a person

(1) [1920] 2 K. B. 487. (2) L. R. 6 Q. B. 724.
(3) L. R. 6 Q. B. 727.

knows that he has not under a statute authority to do a certain thing, and yet intentionally does that thing, he cannot shelter himself by pretending that the thing was done with intent to carry out that statute." As a general rule, no doubt, this is an accurate statement of the law, but in my judgment it does not apply to such a situation as existed in the present case, where the Committee had come to the conclusion that in order to perform one part of their duty under the Act it was inevitable that there should be a default in carrying out another part of such duty. If there was any default for which they would otherwise be liable, it was a default in the intended execution of the Act, and they are protected by the express words of the Act inasmuch as the action was not brought against them within six months after the alleged default.

The result is that in my judgment the appeal should be allowed, and judgment entered for the appellants with costs here and below.

Sankey L.J. In this case the plaintiffs alleged, and the jury apparently found, that the defendants wrongfully and maliciously conspired and combined amongst themselves and with the London District Committee of the Electrical Trades Union to procure cause and induce orders to be given to the Council their servants and agents unlawfully to discontinue the supply of electricity afforded to the plaintiffs by the Council. And, further, that the defendants in pursuance of such conspiracy and combination wrongfully and maliciously procured caused and induced the Council their servants and agents unlawfully to discontinue and deprive the plaintiffs of the supply of electricity from May 4 until May 13, 1926, which said supply the plaintiffs had hitherto received in accordance with the aforesaid provisions and in accordance with a contract in writing dated on or about February 13, 1924, made between the plaintiffs and the Council.

I am of opinion that there was no evidence to support either the allegations or the findings. It is not necessary to repeat the facts at length.

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The defendants are some of the members of the Electricity Committee of the Stepney Borough Council. When the general strike broke out in May, 1926, the Committee were placed in a position of extreme difficulty. The Council were under a contractual and a statutory obligation to supply electricity to the plaintiffs, and they had entrusted the management of their electricity department to the Electricity Committee.

The defendant Major Attlee, the chairman of the Committee, feared that the Council might not be able to control or supply current either for lighting or power. He was particularly apprehensive of the danger that might ensue to the district, which had a large alien population, if the street lighting failed, and of the suffering and probable loss of life which might occur at some of the great hospitals in the district if power failed. He therefore summoned an emergency meeting of the Committee, which did what he thought and what they thought was the best to be done in the circumstances. Admittedly he is an honest man, the learned counsel for the plaintiffs saying in his final address to the jury: "The question here is not whether Major Attlee is a dishonest man, we know he is not."

The Committee decided to do everything they could to maintain the general supply of light and also a supply of power for the hospitals, and they passed the resolutions which have been referred to in this moment of great difficulty after negotiating with the strikers, or their representatives. They might, it is true, have applied to the Government for naval ratings, but they thought, it may be owing to an error of judgment, that this would create disorder in the district. In the result, the public lighting was maintained, as was the power to the hospitals, but the plaintiffs' power was cut off and they have suffered damage. On these facts I can see no evidence at all of any such conspiracy as is alleged in the statement of claim. It is not as if there was any evidence that the members of the Committee, before the emergency meeting, met in their private capacity and determined when they got to the Committee to act upon some

previously arranged policy. Bad faith was expressly disclaimed by the learned counsel for the plaintiffs, and yet in spite of that the jury found that the defendants did not act in good faith, or in the honest belief that they were carrying out their statutory duty, and that they were actuated by an indirect motive to injure the plaintiffs. Not only was there no evidence of conspiracy, but in my view also the defendants are protected by the Public Authorities Protection Act, 1893.

It was argued that the defendants deliberately broke their statutory duty to supply power, and that therefore they could not be said to be protected by the Act, because what they did was not an act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty or authority. I do not think it is possible to regard the circumstances in that way. They must be looked at as a whole. I am not prepared to say how the matter would have stood if the defendants had determined not to supply any electricity of any kind whatever. Here it was just the opposite. They were endeavouring to carry out their duties to supply electricity, but came to the conclusion that the best way was not to supply all the power, in order to get public lighting and power to the hospitals. Bad faith being negatived, they are entitled in my opinion to the protection of the Act.

Suppose, for example, that owing to the negligence of the Council's servants the supply of coal necessary for the generation of electricity had fallen short, with the result that the required amount of electrical current could not be generated and that the Committee had been duly convened to deal with the emergency. Further, suppose that the Committee acting in good faith had reached the conclusion that it was not possible with the diminished coal supply to maintain a full service of current for both light and power, but that one or the other could be maintained. If in these circumstances the Committee acting in good faith and as

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they thought in the public interests of the district had determined to continue the current for lighting, but to cut off the current for power and had done so, or had caused or advised the Council to do so, I am of opinion that the individual members of the Committee would not be liable for damages, as it is sought to make them liable in the present case at the suit of a consumer of power to whom the Council were under a statutory or contractual liability to give a supply. I am not prepared to hold in such circumstances that individual members of such a Committee acting in good faith and as they consider in the public interest are liable in damages to every consumer of power whose supply had been suspended.

Selmes v. *Judge* (1) must be read in reference to its facts. The surveyors of highways there had not taken the proper legal steps to make a rate, although they intended to act in the performance of their duties. The decision in their favour proceeded upon the ground that they had acted bona fide and not under the pretence of performing their duties. The Court were not there considering a case where defendants acting bona fide in order to carry out what they conceived to be the most important part of their duties had neglected or refused to perform another part. Blackburn J. said (2): "I agree that if a person knows that he has not under a statute authority to do a certain thing, and yet intentionally does that thing he cannot shelter himself by pretending that the thing was done with intent to carry out that statute." The important word there is "pretending." Hannen J. was of a similar opinion in his judgment in the same case. I read the remarks of Lord Finlay in *Newell* v. *Starkie* (3) as being to the same effect, although they were not necessary for the decision of the case.

I am far from saying that there may not be circumstances which show that committee men have acted entirely outside the Act. It is not necessary to give examples. It is sufficient to say that there are no such circumstances here.

(1) L. R. 6 Q. B. 724. (2) L. R. 6 Q. B. 727.
(3) 83 J. P. 113.

Allegations of conspiracy may be pushed too far. Juries, as well as judges, must endeavour "to beware of hard constructions and strained inferences," especially in cases where political passions are to some extent involved.

Finally, I have great doubt whether the present cause of action is maintainable against the defendants at all. It will be remembered that the Council were under both a contractual and a statutory obligation to supply light. A breach of either of these obligations was illegal, but I am disposed to think, as far as legal liability for such illegality is concerned, that there would be no more liability upon them than there would be upon the directors of a limited company who, acting in the best interests of the company, caused one of the company's contracts to be broken: see *Said* v. *Butt.* (1) The contractual liability on the Stepney Borough Council did not give a higher claim to damages or a higher measure of damages than their statutory liability did, which provided for a penalty. It is not, however, necessary to decide this latter point, and for the reasons I have already given I think this appeal should be allowed and that the action fails.

Appeal allowed.

Solicitors for appellants: *Druces & Attlee.*
Solicitors for respondents: *Swepstone, Stone, Barber & Ellis.*

(1) [1920] 3 K. B. 497.

J. S. H.

K. B. D. 1927 *Dec.* 9, 10. C. A. 1928 *May* 21.

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[1927. B. 1041.]

Local Government—Local Authority—Appointment of Sub-Committee—Power to enter into Contract—Housing Scheme—Subsidy—Relaxation of By-laws with regard to Drainage—Power of Minister of Health—Local Government Act, 1894 (56 & 57 *Vict. c.* 73), *s.* 56—*Housing, etc., Act*, 1923 (13 & 14 *Geo.* 5, *c.* 24), *s.* 2, *sub-s.* 2 (*a*)—*Housing Act*, 1925 (15 *Geo.* 5, *c.* 14), *ss.* 99, 111.

The plaintiffs, a firm of builders, had erected certain houses on land belonging to them which was situate within the jurisdiction of the defendant council. The houses were not erected under any building scheme but as a private venture of the plaintiffs. In building the houses the plaintiffs had failed to comply with the by-laws of the defendant council with regard to drainage, with the result that differences arose between the parties. Subsequently the defendant council, by agreement with the plaintiffs, appointed a sub-committee of their body to settle all outstanding matters, and ultimately a verbal agreement was arrived at between the sub-committee and the plaintiffs by which the sub-committee agreed that the plaintiffs' system of drainage should remain notwithstanding it did not comply with the defendant council's by-laws, and that if the plaintiffs took certain steps in connection with their building plans, the defendant council would make the necessary application to enable the plaintiffs to obtain the subsidy under the Housing Act, 1925. The defendant council having repudiated the agreement the plaintiffs brought an action for specific performance :—

Held, by Salter J. and the Court of Appeal, that the plaintiffs' houses not having been built in pursuance of a housing scheme to which s. 99 of the Housing Act, 1925, applied, the agreement made by the sub-committee was not binding on the defendant council, for the reason that the latter could not confer on the sub-committee a power which they themselves did not possess of entering into any such agreement.

Held, also, that the Minister of Health had no power under s. 99 of the Act of 1925 to relax the by-laws of the defendant council in the case of a private building scheme such as that of the plaintiffs'.

WITNESS ACTION.

The action was brought by the plaintiffs, a firm of builders, against the defendants, the Flaxton Rural District Council, for specific performance of an agreement made between them on June 21, 1927, and reduced to writing by the clerk to the defendant council in a letter dated June 24, 1928.

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The following statement of facts is taken from the judgment of Salter J. :—

"Before June, 1927, certain differences had arisen between the plaintiffs, Messrs. William Bean & Sons, builders, and the defendants, the Flaxton Rural District Council, who were the local authority for the district in which the plaintiffs were building certain houses. These differences related to some ten or eleven houses which the plaintiffs had built on a building estate belonging to themselves at Earswick. They were houses suitable for the occupation of persons of the working class, and they were being built so as to earn the subsidy which is paid in certain circumstances upon the building of houses of that class, and it was in regard to those houses that two disputes had arisen. The first related to the drainage of those houses, and the second to the question whether or not, in the circumstances, it was the duty of the local authority, if I may use an expression which may not be strictly correct, to apply to the Ministry of Health for the subsidies, or for the local authority itself to pay the subsidies, whichever may be the correct way of putting it.

It was undoubtedly arranged between the plaintiffs and the defendants that an attempt should be made to arrive at a friendly settlement of those disputes, and that for that purpose there should be a meeting and a conference between the plaintiffs and their advisers on the one hand, and a sub-committee of the defendant council, who should be appointed by the council for that purpose, on the other. The plaintiffs' case is that a sub-committee was appointed for that purpose with authority to settle with them, and to do so, if necessary, by making a contract with them which should bind the defendants ; that the sub-committee having been so appointed and authorized, a meeting took place between the parties, and that one agreement or two agreements were made settling the dispute, both as to the drainage and as to the subsidies ; that that agreement, or those agreements, provided that the plaintiffs should do certain things, and that thereupon the defendant council should in the case of the drainage, permit it to remain as it was, and in the case of the subsidies make

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the application to the Ministry of Health. And the plaintiffs say that, in pursuance of that, they did what they undertook to do, and that the defendants have done neither of the two things which they agreed to do, and the plaintiffs accordingly ask for a decree for the specific performance of that agreement or of those agreements.

The defences raised are: First, that the contracts alleged were not in fact made by the sub-committee; secondly, that if they were, the sub-committee had no power to make the said agreements, or either of them, and that for three reasons: (1.) because the authority was an authority to settle everything or nothing, that they did not settle everything, and therefore had no power to make any binding agreement; (2.) that under certain statutes there was no power in the defendant council to authorize them to make these agreements; and (3.) that these agreements were agreements which the defendant council themselves could not have made, and, therefore, could not authorize any delegates to make. These are the grounds on which the action is defended. The first of these grounds is pleaded in para. 7 of the defence; the second is pleaded in para. 6, and there is a further ground set out in para. 8, that this agreement is not valid without the seal, with which I do not think it is necessary at present to deal.

I will deal with these defences in that order. The sub-committee was appointed by a resolution under the seal of the council dated June 4, 1927: "Proposed by Mr. Ezart, seconded by Mr. Vokes, that the following be appointed a committee to meet Mr. Bean and his solicitor, with power to settle any outstanding matters." Then follow the names of the three members of the committee; the seal of the defendant council, and the signature of a gentleman who, I suppose, was the chairman of the meeting. That is the appointment.

I am clear that in this case the contract which is sought to be enforced is a contract made by parol, and was not reduced to a written contract. Certainly the agreement, if any agreement was reached, was made by parol round the

table on June 21. What happened was that on June 24 the clerk to the defendant council wrote to Mr. Bean's solicitor, enclosing what he said was a report of what had taken place at the meeting of the sub-committee on June 21, and I have dealt with this case upon the footing that, for all material purposes, that report is a correct account of what took place. It appears that one of the gentlemen who sat upon the sub-committee was not one of those who had been appointed, but that point is not relied on. The material part of the agreed account is stated thus: "A long discussion took place as to the drainage system adopted by Mr. Bean (contrary to the system shown on the plan for each house, and approved by the council) in regard to the houses erected on his building estate at Earswick, and eventually the sub-committee agreed that the drainage should remain as at present, provided Mr. Bean submitted to the council a lay-out plan of the said estate showing such drainage system." That is the part of the narrative which deals with the alleged agreement about the drainage. Then follows the part which deals with the alleged agreement about the subsidies. "The Clerk to the Council fully explained the present position with regard to the houses erected by Mr. Bean at Earswick, and as to the reason why certain subsidies had not been paid, and after a long discussion, it was agreed that it is essential for Mr. Bean to make a separate application for preliminary certificate for subsidy in respect of each house erected on plots 1, 3 and 4, and a new application for preliminary certificate for subsidy in respect of plot 2. Also to submit plans for the erection of houses on plots 2 and 3, and to forward a certificate to the council that the erection of the house on plot No. 5 sold to Miss Sutherland had been duly completed at a total cost, inclusive of site value, and all other charges, of not exceeding 625*l.*, and making formal application for payment of the subsidy. The members of the sub-committee promised that on this being done the council would submit the matter to the Minister, setting forth the whole facts of the case, and asking for his approval to the payment of the subsidies." That is what happened when the parties met. It is agreed

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that it is an accurate and complete account of what happened as regards the matters now material."

The action was tried before Salter J. without a jury at the Leeds Assizes on December 9 and 10, 1927.

E. A. Mitchell-Innes K.C. and *Arthur Morley* for the plaintiffs.

C. F. Lowenthal K.C. and *William Stewart* for the defendants.

SALTER J. [stated the facts as above set out and continued :] The first point taken is that the sub-committee did not make the alleged contract or contracts. I do not know whether it matters whether this is to be regarded as one contract or two. I think upon the whole it is one contract. There were two matters in dispute, but they related to the same houses, and I think that the arrangement which purported to put an end to the dispute was one contract. It is said that the sub-committee did not make the contract. It is said that it does not say that it was agreed between Mr. Bean, a member of the plaintiff firm, and the sub-committee, but that "it was agreed that the drainage should remain as at present," and that "the members of the sub-committee promised." That point does not impress me at all. I think it is quite clear that there a definite, final and definitely understood agreement was made between the sub-committee and the plaintiffs, as stated in this document, which has been called the précis.

Then it is next said that the sub-committee had no power to make this contract, because their authority was an authority to settle everything or nothing, and that they did not settle everything, and therefore had no power to settle anything. I do not agree with this contention. The power was a power to "settle any outstanding matters." I think that means all or any. As a matter of fact, they settled all, but if they had settled, say, the matter of the drainage, and had failed to settle the dispute about the subsidies, I think they would have been within their authority in settling the matter which could be settled, although they might have been unable to

settle the other. In my opinion, therefore, there is nothing in the point that they had no power to make the agreement made.

I now come to a more substantial matter, and that is whether the defendant council, which is a statutory body exercising statutory powers under statutory restrictions, could authorize a sub-committee to make this contract, not in the sense of negotiating it and submitting it for approval, but in the real sense in which an agent makes contracts, contracts which bind his principal, whether the principal likes it or not. The first section which has to be construed is s. 56 of the Local Government Act, 1894. Sub-sect. 1 of that section provides that "A parish or district council may appoint committees, consisting either wholly or partly of members of the council"—this sub-committee consisted partly of persons who were not members of the defendant council—"for the exercise of any powers which, in the opinion of the council, can be properly exercised by committees, but a committee shall not hold office beyond the next annual meeting of the council, and the acts of every such committee shall be submitted to the council for their approval." So far, it is quite clear that agency is not contemplated in any real sense, because the acts of the sub-committee have to be submitted for approval. Then follows: "Provided that where a committee is appointed by any district council for any of the purposes of the Public Health Acts or Highways Acts, the council may authorise the committee to institute any proceeding or do any act which the council might have instituted or done for that purpose other than the raising of any loan or the making of any rate or contract." Therefore, it is clear that where you get to agency there is no power to contract. I am not at all sure that this sub-committee was appointed by the defendant council for any of the purposes of the Public Health Acts, but I do not decide this case on that point. It appears to me to be perfectly plain that under this section there was no power to appoint a sub-committee which could make a contract which would bind the defendant council. I think that this was an appointment made under

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the first part of this section and not under the second, but in any case, in my opinion, there is no power to invest the sub-committee with any power to make any contract. That appears to me to dispose, apart from other points, of this case so far as concerns what has been called the drainage point.

Mr. Mitchell-Innes has relied, both as to this point and as to the subsidy point, on s. 111 of the Housing Act, 1925. That section has to be considered, and I will consider it in connection with the subsidy point; but so far as this drainage point is concerned, I am of opinion that it has no application. It empowers a local authority acting under that Act to appoint a committee, consisting of so many persons as they may think fit, for any purposes of that Act. The purposes of that Act can be gathered generally by looking at its divisions. This sub-committee was appointed for the purpose of settling a dispute about by-laws and drainage, which had nothing to do with the Housing Act, 1925, or any of the purposes of that Act. It is true that working class houses require drains like any other houses, but the dispute is one that might have arisen long before any Act for the housing of the working classes was ever thought of, and I think that s. 111 has no application to this part of the case.

Then it is said further that the defendant council had no legal power to invest the sub-committee with power to make this contract, for this reason, that it was a contract which the defendant council themselves, acting in the most formal manner under their seal, could not have made. That is sufficiently pleaded under para. 6 of the defence. In my opinion these houses, as they had in fact been built, were in breach, as regards drainage and drain-pipes, of by-law No. 16, and further, that they were in breach of by-law 42. I have some little doubt about that point, but, on the whole, without attempting to define a cesspool, I think that these so-called septic tanks are things contemplated under the head of "cesspools" in by-law 42, and that that by-law is therefore broken. And, further, I think that the houses had been erected in breach of by-law 45. In connection with this,

I may say that I was not satisfied by the evidence of Mr. Bean that he did what he did to those houses at the request or invitation of the sub-committee, and certainly I am not satisfied that the plan which he delivered on June 28, after the meeting, was a plan which ever received official approval from the council, and it certainly required it. I content myself with taking the statement in the précis that the drainage system adopted by Mr. Bean was contrary to the system shown on the plan for each house and approved by the defendant council. I take it as clearly proved that these houses had been erected in material deviation from the deposited and approved plans, and as I understand *James* v. *Masters* (1) to have decided that where you have a by-law substantially the same as by-law 45 here, requiring persons who intend to build, to deposit plans with the authority and get them approved, to build without such approval is an offence, and, further, that if the houses are built with material deviation from the plans approved, that is equivalent to building without plans and is an offence.

I think, therefore, that on all three grounds these houses had been built contrary to law, and that the defendant council could not themselves have made an agreement to allow such a state of things to continue. It amounted to dispensing with compliance with their by-laws, and that they had no legal right to do: see *In re McIntosh and Pontypridd Improvement Co.* (2) and *Yabbicom* v. *King*. (3)

For these reasons, therefore, apart from the question of the seal, I think the defendants have succeeded so far as the drainage point is concerned.

I now come to the question of the subsidies. There we are concerned with s. 111 of the Housing Act, 1925. That Act re-enacted in terms s. 81 of the Housing of the Working Classes Act, 1890, as amended by the Housing, Town Planning, etc., Act, 1919, s. 39, Sch. II. In my judgment it is very arguable that a sub-committee duly appointed by a

(1) [1893] 1 Q. B. 355. (2) (1892) 8 Times L. R. 203.
(3) [1899] 1 Q. B. 444.

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local authority under s. 111 would have the power to make contracts, which would bind the local authority, without any ratification. Whether they would have power, even if appointed under seal, to make contracts which required the seal of the authority to bind the authority is a more difficult question. In this case I do not think that a seal is necessary, and with an agreement of that kind it may well be that a sub-committee duly appointed under s. 111 could make a contract to bind the council, or, in other words, that the council would have power to duly authorize them to do so.

Then the question arises whether this sub-committee was a committee appointed for any purposes of this Act. In my opinion, giving the matter the best consideration I can, this was not a committee appointed for any of the purposes of this Act. It would take too long to go through the Act in order to see what were the purposes for which it was passed, but I do not think that a committee appointed to see whether they could make a settlement of a dispute of this kind as to whether subsidies were to be applied for or not, is a committee appointed for the purposes of this Act.

But that is not the only ground on which I decide the point. There is a simpler ground, and that is the ground under the by-laws to which I have referred. These were houses which had been erected and existed in disobedience of the by-law, and if the defendant council had made an agreement that they would, in effect, represent to the Minister that this was a proper case for a subsidy to be paid, they would have been, in my opinion, promising to do an illegal and improper thing. I think their agreement must have amounted to that, because an agreement to communicate with the Minister and tell him that these were illegal houses and ask whether the subsidy was to be paid, was clearly not what the parties contemplated. It was an agreement that they should help him to get the subsidy by representing that the houses were such as entitled him to get the subsidy. They had no right to make such an illegal agreement, and this Court has no power to entertain something which they know to be illegal.

For these reasons I have come to the conclusion that the defendant council must succeed, both as to the subsidies as well as to the drainage point.

The defendant council, having made this agreement by their sub-committee, and their clerk having written to the Minister to tell the Minister that everything had been settled, were annoyed later by a letter which was written to them in connection with some other wholly different matter, and some person who appears to have the power, or to have assumed the power, to use the name of the clerk, who was away, wrote a letter saying that as the plaintiffs had decided to make a claim against them, the defendant council would go back on what their sub-committee had done, and would repudiate it, as indeed they have done. The letter, put upon that ground, was an odious piece of official tyranny, but it is not my business to express an opinion upon the morality or the propriety of the course which the defendant council have taken. I have arrived at the conclusion, not without some regret, that the defendant council are entitled to judgment, and there must be judgment accordingly.

The plaintiffs appealed. The appeal was heard on May 21, 1928.

E. A. Mitchell-Innes K.C. and *Arthur Morley* for the appellants.

William Stewart and *H. S. Houldsworth* for the respondents.

The arguments sufficiently appear from the judgments.

LORD HANWORTH M.R. This appeal fails and must be dismissed. In saying that, I desire to share the regret expressed by Salter J. at the trial. Indeed, my regret is stronger than his was, because at one time I thought it might be possible to overcome the legal difficulties with which he found himself confronted and to allow the appeal, and to make an order which I think would have been more consonant with justice upon the facts of this case. It appears to me that the plaintiffs have been hardly and harshly treated by the defendant council, who have endeavoured to put

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difficulties in their way, and have failed to show a certain amount of good will in carrying out the agreement by which they were bound, if not by the strict law, at any rate, in honour, to the plaintiffs. It is quite obvious that Salter J. shared exactly the same views, and I desire to express them in the hope that this body, or some members of this body, may try to use their powers in a manner which will be of greater service to the community at large, and in particular towards the plaintiffs, with whom this agreement was made, and which they now repudiate on legal grounds.

The facts of this case may be stated quite shortly. The plaintiffs were builders, who put up a number of houses within the jurisdiction of the defendant council. The site of these houses was at a place called Earswick. There were a number of houses which they had erected. So far as the evidence goes, it was no part of a scheme originally promoted by the defendent council themselves; it was an enterprise started by the plaintiffs, but, of course, with a view to securing the subsidy which can be given under s. 2 of the Housing, etc., Act, 1923, which provides as follows: "Local authorities for the purposes of Part III. of the principal Act, may, in accordance with proposals submitted by them to the Minister and approved by him, promote the building of houses, whether within or without their areas, by giving or undertaking to give assistance in respect thereof in the manner hereinafter provided." Then sub-s. 3 says what assistance may be given: that is to say, the local authority may "(*a*) make or undertake to make grants by way of lump sum payments after the completion of the houses." The plaintiffs built houses, but they did not comply with some of the by-laws of the defendant council as to the drainage of the houses, and difficulties arose between them—difficulties of a serious nature—and on June 1, 1927, proceedings which had been taken culminated in a county court action, which was down for hearing at York. This action was by agreement withdrawn. Immediately arising out of that, the defendant council undertook to appoint a sub-committee to deal with the difficulties which had arisen with the plaintiffs, and in

accordance with that there was, on June 4, 1927, a minute, which is as follows: "The following be appointed a sub-committee to meet Mr. Bean and his solicitors with power to settle any outstanding matters." That minute does credit to both parties. A reasonable step was taken to try and settle all outstanding matters, and a sub-committee was appointed with that power and for that purpose. There was a meeting on June 21, and we have what is called a précis. It amounts to a record of what took place at the meeting and of the agreement reached. Certain matters are set out as to the question of the powers of the defendant council and the responsibility for drainage expenses and the like. Then it is stated: "A long discussion took place as to the drainage system adopted by Mr. Bean (contrary to the system shown on the plan for each house and approved by the council) in regard to the houses erected on his building estate at Earswick, and eventually the sub-committee agreed that the drainage should remain as at present, provided Mr. Bean submitted to the council a lay-out plan of the said estate, showing such drainage system."

We must take it that the fact was that the plaintiffs' drainage scheme as supplied to the houses was contrary to the system approved by the defendant council acting in accordance with their by-laws. The sub-committee say that the system has to remain as at present. It appears that they had no power of any kind to do that, as they would be abrogating the by-laws and preventing their effective control of the drainage, but that is what the sub-committee agreed to at the time—namely, that the drainage should remain as at present. Then the next matter that is recorded is this. "The clerk to the council explained fully the present situation with regard to the houses erected by Mr. Bean at Earswick, and as to the reason why certain subsidies had not been paid, and after a long discussion, it was agreed that it is essential for Mr. Bean to make a separate application for preliminary certificate for subsidy in respect of each house erected on plots 1, 3 and 4, and a new application for preliminary certificate for subsidy

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in respect of plot 2, also to submit plans for the erection of houses on plots 2 and 3, and to forward a certificate to the council that the erection of the house on plot No. 5, sold to Miss Sutherland, had been duly completed at a total cost inclusive of the site value and all other charges, of not exceeding 625*l.*, and making formal application for the payment of the subsidy." It is clear that the passage I have now read related to the second limb of the agreement, that was, how, when and by what means the subsidy under s. 2, sub-s. 3, of the 1923 Act could be paid to Mr. Bean. Mr. Bean has complied with the conditions laid down in that last paragraph. He has sent in a lay-out plan of the drains; he has taken the steps which are required of him, and he has submitted plans for the erection of houses on plots 2 and 3.

In response to that, and as the consideration which the sub-committee are to give to Mr. Bean on these two points, namely, the drains and the subsidies, the agreement is recorded as follows: "The members of the sub-committee promised that on this being done, the council would submit the matter to the Minister setting forth the whole facts of the case, and asking for his approval to the payment of the subsidies." When that report, or précis, went back to the defendant council on July 8 a letter was written that the council did not confirm the sub-committee's report; that there was an infraction of the drainage by-laws, and the agreement, therefore, was of no value, since it was not confirmed by the defendant council.

Now we are told without any contradiction that the action of the defendant council was dictated by some extraneous matter on which there was disagreement between Mr. Bean and the defendant council, a matter which was not relevant at all to this issue between them. I say unhesitatingly that I think it is unfortunate that a public body should allow itself to resile from an agreement by reason of something between the parties which had no relevance to the terms of agreement. But there it is. An action was then brought on August 27, 1927, by the plaintiffs, asking for the specific performance of this agreement which had been entered into,

and which is recorded in the précis of June 21. The action was tried before Salter J., and who on December 10, 1927, gave judgment, reluctantly dismissing the action. From that an appeal is made to this Court, and we have, as I have already stated, with equal reluctance come to the conclusion that we are unable to overcome the legal difficulties, and that Salter J.'s decision must stand.

I think, with Salter J., that there was one agreement made, but that it was one agreement which covered two specific matters. The one was the drainage, the other was the subsidy. With regard to the drainage, I think there was a difficulty in the sub-committee acting as they did, and purporting to override the by-laws. I have some difficulty, that is, on the point that is raised as to whether or not an agreement of this nature, to be valid, must be under seal. It is argued for the plaintiffs that, inasmuch as Mr. Bean has executed his part of the agreement, and that what remains to be done is that which is to be done by the defendant council, the case may fall within those cases, where, there being an executed agreement, it has been held that the corporation can be sued for payment resulting from the execution of the agreement. It may be that this is such a case, or it may be that, inasmuch as the defendant council appointed this sub-committee under seal, the sub-committee would have power to act, and that the point as to the seal is sufficiently met by the seal of the defendant council appointing the committee. If that be the solution, that brings us back to this point, that the committee would only have power to do what they were authorized to do by the defendant council, and I cannot find any authority or any power in the defendant council to authorize the sub-committee to act in defiance of the existing regulations as to drainage.

Therefore, whether one puts the matter on the absence of a seal, or on the powers of the sub-committee to act in relation to the matter entrusted to them, one is brought back to this, that the sub-committee had no authority to do what they purported to do: that is to say, to allow drainage contrary to the system shown on the plan to remain

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as at present in defiance of the existing regulations of the council.

Then comes the next point as to the subsidy, and it is said that, although under s. 56 of the Local Government Act of 1894 a committee appointed by a council has certain powers, there is a limitation against it having power to raise a loan or make a rate or a contract. I need not go into the chain of statutes which apparently are sufficient to show that that section would now apply to the defendants in this action. But it is said that that shows that the sub-committee had no power to make a contract. On the other hand, it is argued that the limitation does not apply, for there are other sections which may be looked at to provide greater powers to the sub-committee. In the Housing of the Working Classes Act, 1890, s. 81, there was a provision that a committee appointed with reference to that Housing Act should not be authorized to enter into a contract. But that s. 81 has now been amended by s. 39 of the Housing, Town Planning, etc., Act, 1919, by leaving out the words "or to enter into any contract." Hence it is said that there is power to make a contract. So far I have some difficulty in following that, but it does not affect the point I have already dealt with.

Then we come to the Housing Act, 1925, and it is contended that by s. 99 it is possible for an approval to be given by the Minister to a housing scheme to which the section applies even although there are proposals in that scheme which offend against existing by-laws. But by sub-s. 3 of s. 99 the only housing schemes to which that section applies are the schemes made by a local authority or county council, or by a public utility society or housing trust, and approved by the Minister. This proposal to build these houses was not, so far as the evidence goes, a scheme or part of a scheme initiated by a local authority or a county council, or by any of the persons named in sub-s. 3. It was an enterprise started by the plaintiffs themselves. It appears clear therefore that s. 99 does not enure to enable the Minister to dispense with the by-laws and regulations, because he cannot regard the building of those ten or eleven houses as the scheme of an authority referred to under

sub-s. 3 of s. 99 of the 1925 Act. The result is that although one may look at the single contract and divide it up into its two limbs, on the question of drains the sub-committee have attempted to make an agreement which was impossible and could not bind the defendant council, and with regard to the subsidy, there are legal difficulties in the way of a dispensing power on the part of the Minister on points which offend against the existing by-laws.

For these reasons, in addition to those which were given by Salter J., I feel it impossible to intervene to grant the plaintiffs the relief which they seek, and the appeal must be dismissed with costs.

SANKEY L.J. I agree, especially as to the very unfortunate result which has happened, a result which I hope in spite of everything which has been said and done, it may be possible to put right.

The plaintiffs' claim is for specific performance of an agreement, which they say was made between them and the defendant council on June 21, 1927. The facts are rather meagre, but are sufficiently detailed in the further particulars which are set out in the pleadings. The plaintiffs allege that "The defendants have wrongfully withheld their sanction to plans submitted to them by plaintiffs for the erection of thirty dwelling-houses at Earswick, whereby the plaintiffs have been and still are prevented from developing a building estate belonging to and owned by the plaintiffs there, have thereby deprived the plaintiffs from making profits from the carrying on of their trade as builders, and the plaintiffs have suffered loss thereby."

The plaintiffs had this building scheme which they wanted to develop, and they were minded also to get the subsidy which private persons who develop schemes can get under the Housing, etc., Act, 1923, s. 2. This is not a case which comes under s. 99 of the Housing Act, 1925, at all, because, as my Lord has pointed out, the housing schemes to which that section applies are schemes made (*a*) by the local authority or (*b*) by a county council, or (*c*) by a public utility society or housing trust approved by the Minister.

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This scheme does not come under any one of those categories. It was a private scheme and the plaintiffs were anxious to get the subsidy for it, and to get their plans passed by the local authority. In order to get the subsidy, they would have to rely on s. 2 of the Housing Act of 1923, which provides, by sub-s. 2, that before approving proposals under this section, the Minister shall be satisfied in respect of the houses, and it is said in sub-s. 4: "Assistance given by a public authority under this section in respect of a house may be made subject to such conditions as the local authority may with the approval of the Minister impose." So that they would have to do two things: they would have to get the general approval, and they would have to get their plans passed. Unfortunately, as I gather from the facts, they did not get their tackle in order. They built certain houses, but the drains did not comply with the by-laws of the local authority. They went to the county court, but a settlement was come to of the matters in difference between the parties by the agreement to which I have already referred. It was a single agreement, but it appears to me to deal with two things: (1.) this question of drainage (the plans for the drains were not in accordance with the by-laws), and (2.) this question of the subsidies.

The agreement says that a sub-committee agreed that the drainage should remain as at present, provided that Mr. Bean submitted to the council a lay-out plan of the said estates showing such drainage system. This was what was to be done as to the drainage. Then, secondly, the members of the sub-committee promised that, on certain things being done, the defendant council would submit the matter to the Minister, setting forth all the facts of the case, and asking for his approval to the payment of the subsidies. That probably had to be done, because the Minister had not yet given his consent so far as we know, and it was rather late to ask for it, having regard to sub-s. 2 of s. 2 of the Act of 1923. These were the two matters.

Mr. Bean did send a lay-out plan of the said estate, showing the drainage system, and no doubt he thought

he had done his part, and that the sub-committee then had agreed that the drainage should remain as at present. Unfortunately, for some reasons, we are told, connected with some other matter altogether, the council did not affirm the decision come to by the sub-committee, and no doubt Mr. Bean thought himself much aggrieved, but the defendant council took a legal point. They said: "Well, the sub-committee had no power to let the drainage remain as at present, because that is in defiance of our by-laws; we should not have come to that agreement ourselves, and we could not authorise anybody to come to that agreement on our behalf." It is clear on the case of *Yabbicom* v. *King* (1), referred to in the learned judge's judgment, that a local authority has no power to sanction plans in contravention of its own by-laws properly made.

Then, it was sought to be said: "Well, the local authority had power to appoint this sub-committee under the circumstances: the sub-committee had power to make a contract, and they made this contract in regard to the drains." That would depend chiefly on s. 111 of the Act of 1925, which provides: "A local authority acting under this Act may appoint a committee consisting of so many persons as they may think fit, for any purposes of this Act which in the opinion of such authority would be better regulated and managed by means of a committee: Provided that a committee so appointed shall consist as to a majority of its members of members of the appointing local authority, and shall in no case be authorised to borrow any money or to make any rate, and shall be subject to any regulations and restrictions which may be imposed by the authority that formed it." It is argued on behalf of the plaintiffs that that section applies here; that the defendant council had a right to appoint a committee for this purpose, and the committee had a right to sanction this breach of the by-laws. In my view, this is an incorrect suggestion. I think, as the learned judge in the Court below did, that s. 111 does not apply to this case at all, but that the section which does apply is s. 56

(1) [1899] 1 Q. B. 444.

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of the Local Government Act of 1894. I do not think that the sub-committee had power to make a contract under which these drains should remain as at present. That would lead to a breach of the council's by-laws. It is a very unfortunate result, but as the sub-committee had not power to do it, for the reasons given, has the council power to do it? In my view the agreement was ultra vires the council itself, and could not be enforced against it. I at first thought: "Well, the meaning of the agreement is that the whole matter should be submitted to the Minister of Health provided that Mr. Bean submitted to the defendant council a lay-out plan of the said estate showing such drainage system, as in fact he had done, and that the Minister of Health might be asked to pay the subsidy." I wish I could have decided that, but the Minister of Health would not have power in the present case to relax the by-laws, because the power to relax by-laws given in s. 99 of the Housing Act of 1925 is only a relaxation in cases of housing schemes promoted by the persons referred to in that section, sub-s. 3, which this particular housing scheme was not. Therefore the learned judge was right in saying that s. 111 does not apply any more than s. 99, and for the reasons given the sub-committee had no power to do this, and the council had no power to authorize the sub-committee to do it.

In these circumstances it is not necessary for me to say whether in my view the contract was unenforceable because it was not under seal. If that had been the only point, one would have liked further argument, and there would have been possible ways in which we could have got over the objection. With some regret I come to the conclusion that the appeal must be dismissed, and I only hope that this unfortunate predicament in which the parties find themselves may be rectified.

RUSSELL L.J. I agree, and I share the regret which has been expressed in the previous judgments, but I am afraid there is no other course open to us but to dismiss the appeal, and I can state my views in very few words.

In my opinion, unless it can be established—which it cannot be—that the building of these houses by the plaintiffs was or formed part of a housing scheme to which s. 99 of the Housing Act of 1925 applied, the appeal must fail, and for this reason, that the verbal contract made by the sub-committee on June 21, 1927, is not binding on the defendant council. It is not so binding for this reason, that the defendant council could not confer upon the sub-committee a power of entering into any such contract. To enter into any such contract would not, in my view, be or constitute the regulation and management of any of the purposes of this Act within the meaning of s. 111 of the Act of 1925.

Appeal dismissed.

Solicitors for the appellants: *Collyer-Bristow & Co., for A. E. Masser, Leeds.*

Solicitors for the respondents: *Hedley Norris & Co., for Joseph Peters & Sons, York.*

W. I. C.

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Oct. 29, 30, 31; *Nov.* 1, 2; *Dec.* 13.

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[1928. F. 345.]

LINDSAY *v.* ATTFIELD AND ANOTHER.

[1928. L. 536.]

LINDSAY *v.* DRISCOLL AND OTHERS.

[1928. L. 516.]

Contract—Validity—Public Policy—International Comity—Sale of Whisky—Exportation to United States—Bill of Exchange—Unstamped Document—Foreign Bill—Adding wrong Date—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *ss.* 12, 64.

F., a financier, L., a distiller, D. & M., a firm of shipbrokers, and one A. were minded to load a ship with a cargo of whisky to be carried across the Atlantic and sold in the United States, or at some point from which it could easily be smuggled into the United States, in violation of the laws of that country. D. & M. entered into a contract to buy a steamer for 2565*l.*; F. advanced 256*l.* as a deposit on the purchase. On October 26, 1927, an agreement was entered into between F., L. and D. & M., whereby L. agreed to sell to D. & M. 7500 cases of whisky at 27*s.* 6*d.* a case free on board at Leith or Glasgow to be delivered ex warehouse not later than November 26. D. & M. were to take delivery on board a vessel of a regular line of steamers. Payment was to be made by a bill for 5500*l.* drawn by F., accepted by A. and indorsed to L., and a second bill for 4812*l.* accepted by A. and D. & M., both bills to be payable ninety days from November 26, and to be drawn and accepted on October 26 and handed to L. to hold as security until he should hand the shipping documents or delivery order from bond on or before November 26. L. agreed to lend D. & M. 2500*l.* (1000*l.* at 8 per cent. per annum and 1500*l.* at 40 per cent. per annum interest) for the purchase of the steamer, the loan to be secured by a first mortgage on the steamer. F. agreed to lend D. & M. 1000*l.* at 40 per cent. per annum interest to be secured by a second mortgage on the steamer. D. & M. agreed to insure the steamer for 1000*l.* against all risks including seizure or confiscation and 2500*l.* against marine risks, and deliver to L. cover notes for 1500*l.* and 1000*l.* and to F. a cover note for 1000*l.* F. and L. agreed jointly to underwrite the insurance for 1000*l.* against confiscation at a figure to be agreed in the event of the ordinary market rate exceeding thirty guineas per cent. D. & M. agreed to provide 1600*l.*, the estimated balance required for the equipment of the steamer for the voyage:—

Held, by Lawrence and Sankey L.JJ., that, the object to be attained by this agreement being a breach of international comity, the agreement was contrary to public policy and void.

Scrutton L.J. dissenting, on the ground that the whisky might have been sold in Canada or Nova Scotia or on the high seas, without any breach by the parties of the law of the United States.

In intended pursuance of the agreement two documents, undated, and purporting to be bills of exchange, though written upon unstamped paper, were sent to L.; both were headed "London"; one was drawn by F., accepted by A., and indorsed by F., and was for 5500*l.* payable ninety days after date; the other was not signed by any one as drawer; it was accepted by A. and by D. & M., and was for 4812*l.* payable ninety days after date. Delay having occurred in naming a liner to take delivery of the whisky and in equipping the steamer for the adventure, L. gave to D. & M. a delivery order addressed to the keepers of the bonded warehouse where the whisky was in store. D. & M. immediately pledged the whisky for 500*l.* F. hearing of this paid off the loan and took a transfer of the delivery order. The so-called bills of exchange for 5500*l.* and 4812*l.* were sent to L., who was at Lausanne. He struck out "London" and substituted "Lausanne," added December 3 as the date of each, and signed his name as the drawer of the second, and stamped them both as foreign bills.

Held, by Scrutton L.J. (Sankey L.J. concurring, if, contrary to his opinion, the agreement of October 26, 1927, was to be held valid):—

(1.) that L. by giving the delivery order to D. & M. had not committed a breach of the agreement, and that, if he had, F. could not complain of the breach after having himself taken a transfer of the delivery order;

(2.) that the so-called bill for 5500*l.*, being drawn, accepted and indorsed in this country on unstamped paper, was void by s. 2; s. 37, sub-s. 2; and s. 38, sub-s. 1, of the Stamp Act, 1891;

(3.) that the so-called bill for 4812*l.*, though valid in other respects, as a foreign bill (notwithstanding s. 64 of the Bills of Exchange Act, 1882), was invalidated by L. having added a date not in accordance with the contract, and was not protected by s. 12 of the Act.

APPEALS from judgments of Wright J. in three actions tried together by the learned judge without a jury.

Sir Harry Seymour Foster, a knight and a member of Parliament, carried on business as a financier at 82 Victoria Street, Westminster. James Douglas Driscoll and Arthur Stanley Miller were shipbrokers carrying on business as the Tower Trading Syndicate at 6 Harp Lane in the City of London. Frederick Archibald Lindsay was a distiller trading in Edinburgh and at 72 Mark Lane in the City of London. James Herbert Attfield was a retired schoolmaster residing at 25 Warwick Road, Worthing.

These five persons entertained the project of equipping a steamship and loading her with a cargo of whisky in cases

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and conveying it across the Atlantic to be sold in the United States, if that were possible, or, if not, in Canada or on the high seas at some point sufficiently near the territory of the United States to facilitate a sale in that territory in violation of the laws of the United States. It was proposed that F. A. Lindsay should provide the whisky, that Driscoll and Miller should find the steamer, that Sir H. S. Foster should finance the adventure, and that J. H. Attfield should see to the disposal of the whisky and receive the profits of the sale.

F. A. Lindsay provided for this enterprise 7500 cases of whisky, which were stored in a bonded warehouse in Edinburgh. In order to obtain a licence to export spirits in bond without payment of duty the proprietor of the spirits must give notice to an Inland Revenue officer in charge of the warehouse of his intention to ship the spirits, the time and place of shipment and the name and destination of the ship. He must also give a bond to secure that the spirits specified in the notice shall be conveyed to the quay where the ship is lying, shall be put on board the ship, and shall be exported to and landed at the port specified in the notice and not at any other place: see the Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 81. The bond is subsequently discharged by the Inland Revenue authorities on production of a certificate issued at the port of destination that the spirits have been landed abroad.

On October 7, 1927, the syndicate entered into a contract to purchase the steamship *Wearhome* of 625 gross tonnage for the sum of 2565*l.*, Sir H. S. Foster having advanced 256*l.* 10*s.* of that sum as a deposit on the purchase.

In these circumstances, on October 26, 1927, the following memorandum of agreement was drawn up between Sir H. S. Foster of the first part, F. A. Lindsay of the second part, and J. D. Driscoll and A. S. Miller (therein referred to as "the syndicate") of the third part:—

"(1.) The said F. A. Lindsay agrees to sell and the syndicate agrees to buy 7000 to 7500 cases of Scotch whisky (quantity at Mr. Lindsay's option) twelve bottles in each case of 24 U.P.

guaranteed all over two years and averaging over three years old at the price of 27*s.* 6*d.* per case f.o.b. Leith or Glasgow.

"(2.) Shipment to be made at the earliest possible date and in any case goods to be delivered ex warehouse not later than November 26 next, the said F. A. Lindsay undertaking to put in hand not later than October 24 (sic), 1927, the preparation of the whisky for shipment.

"(3.) It is agreed that the syndicate will take delivery of the goods on board a regular line of steamships ex either of the ports indicated in order that suppliers can secure a landing certificate.

"(4.) If 7500 cases are prepared for shipment payment to be made by a bill for 5500*l.* at ninety days sight from November 26, 1927, drawn by the said Sir H. S. Foster on and accepted by James Herbert Attfield and indorsed to the said F. A. Lindsay such bill to bear no interest and a bill for 4812*l.* 10*s.* at ninety days sight from November 26, 1927, without interest accepted by the said J. H. Attfield, J. D. Driscoll and A. S. Miller both the said bills to be drawn and accepted on the signing of this agreement and handed to F. A. Lindsay to hold as security until the said F. A. Lindsay hands to the Syndicate the mate's receipt or shipping documents or delivery order from bond on or before November 26 next. . . . .

"(5.) The said F. A. Lindsay agrees to lend to the syndicate the sum of 2500*l.* (1000*l.* at 8 per cent. per annum and 1500*l.* at 40 per cent. per annum) for the purchase of the steamship *Wearhome* to be secured by a first mortgage on that steamer. The said Sir H. S. Foster agrees to lend to the syndicate the sum of 1000*l.* (including the sum of 256*l.* 10*s.* already advanced to provide for a deposit on the purchase) at 40 per cent. per annum to be secured by a second mortgage on the said steamship. The syndicate agrees to insure the *Wearhome* at Lloyd's in the sum of 3500*l.* of which 1000*l.* against all risks including the seizure or confiscation by any Government and the balance against marine risks and to deliver to the said F. A. Lindsay on the completion of the purchase a policy or cover note for 1500*l.* ordinary risk and 1000*l.* confiscation

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risk and seizure. Cover note for the balance of 1000*l.* ordinary risk to be handed to Sir H. S. Foster. The purchase to be completed on October 26, 1927.

"(6.) Suppliers' bond shall be open to the inspection of the syndicate during the period of preparation of the goods and unless written protest is made against any 1000 cases in the whole or part then each such 1000 cases is taken to be accepted and no further question or objection can arise.

"(7.) With regard to the confiscation risk for 1000*l.* as per clause 4 (sic. qu 5), it is agreed that Sir H. S. Foster and Mr. Lindsay jointly underwrite this risk at a figure to be agreed in the event of the ordinary market rate exceeding thirty guineas per cent.

"(8.) The balance of the funds for the equipment of the vessel for the voyage estimated at 1600*l.* shall be provided by the syndicate and evidence shall be produced reasonably satisfactory to Sir H. S. Foster before or on completion under clauses 4 and 5 hereof that this has been arranged.

"As witness, etc."

On the same day by a memorandum of agreement expressed to be supplemental to the above agreement it was agreed between the parties to the said principal agreement that the date for delivery of the whisky provided in clause 2 thereof should be extended to November 29, 1927, owing to the delay in the completion of the principal agreement, "and for one day additional in respect of every further day's delay in handing to F. A. Lindsay the bills referred to in clause 4.

"As witness, etc."

On the same day, in consideration of Sir H. S. Foster completing the memorandum of agreement of October 26, 1927, J. D. Driscoll and A. S. Miller (hereinbefore referred to as "the syndicate") jointly and severally agreed that the first proceeds of the sale up to 11,000*l.* should be remitted to Sir H. S. Foster to be applied by him in meeting the bill for 5500*l.* referred to in clause 4 of the said agreement and paying off the second mortgage for 1000*l.* referred to in clause 5 of the said agreement and that the balance of 4500*l.* should be retained by Sir H. S. Foster for his services in connection with the said

agreement. And the syndicate agreed to notify J. H. Attfield (mentioned in the said agreement) and obtain his undertaking to make the said payment to Sir H. S. Foster.

On the same day, in intended pursuance of clause 4 of the principal agreement, two documents, undated, and purporting to be bills of exchange though written upon unstamped paper, were sent to F. A. Lindsay's representative in London. One of these purported to be a bill of exchange drawn by Sir H. S. Foster for 5500*l.* payable ninety days after date, accepted by J. H. Attfield and indorsed by Sir H. S. Foster; the other purported to be a bill of exchange for 4812*l.*, payable ninety days after date, accepted by J. H. Attfield and by the syndicate, but having no name as that of a drawer.

The syndicate found some difficulty in naming a steamer to take delivery of the whisky. On November 3 they purported to allow Lindsay seven extra days in which to complete the bottling, but these extra days were not required, as the whisky was ready for shipment on November 26. Further delays were incurred in efforts to procure a bond which would satisfy the Inland Revenue officer. It was proposed that a steamer of a regular line should take the whisky from Glasgow to Dublin and that the whisky should there be transhipped on board the *Wearhome*. But no suretyship association was found ready to guarantee a bond in such circumstances. Meanwhile F. A. Lindsay saw the time approaching when the bills for 5500*l.* and 4812*l.* should become due according to the agreement of October 26. Mr. Berry, his agent at Perth, proposed that a delivery order for the goods in bond should be given to the syndicate, so that Lindsay should "get his bills working." He contended that clause 4 of the agreement enabled Lindsay to take this course. On November 26, 1927, he wrote to the syndicate: "I beg to confirm having advised you that the 7500 cases of Scotch whisky are ready and that I await your shipping instructions. It is understood now that you will arrange to provide the necessary export bond." Accordingly, on December 1, 1927, Lindsay handed to the syndicate a delivery order addressed to the Tanfield Bonding Company, Canonmills, Edinburgh, the bonded warehouse

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where the 7500 cases of whisky were in store, directing the company to deliver them to the syndicate and to charge them with any expenses from and after that date. The syndicate acknowledged the receipt of the delivery order. On December 2 Lindsay wrote to Sir H. S. Foster: "Delivery of the 7500 cases has been duly effected to the order of the Tower Trading Syndicate in conformity with the terms of the agreement dated October 26 last. The bill for 5500*l.* commences maturing as from to-day's date." On December 5 Sir H. S. Foster wrote to the syndicate saying he had heard from Lindsay of the delivery of the whisky to the order of the syndicate in conformity with the terms of the agreement of October 26, and that the bill for 5500*l.* had commenced to run from December 2, and asking whether this was in order. On December 7 the syndicate acknowledged this letter.

The syndicate being thus in control of the whisky in bond at once indorsed the delivery order by way of pledge to one J. H. Brown, to whom the bonding company attorned. J. H. Brown gave a delivery order by way of pledge to the Midland Bank, and the Midland Bank gave a delivery order to Arthur Neagle & Co., Ld. By these means the syndicate borrowed on the security of the whisky a sum of 500*l.* on which they had to pay interest at the rate of 75*l.* a month.

On hearing of these transactions Sir H. S. Foster, on February 1, 1928, paid Arthur Neagle & Co., Ld., 575*l.*, and took from them a delivery order for the whisky. On that date he wrote to Lindsay: "As a result of inquiries which I have made . . . . I found that the Tower Trading Syndicate had pledged the delivery order which, to my astonishment, you had handed to them, and which gave them complete control over the 7500 cases, and I have to-day rescued these by paying Messrs. Arthur Neagle & Co., Ld., 575*l.* I found other matters which were holding back and imperilling the whole venture and I have therefore had to take over control, and it is necessary that I should consult with you in view of the changed position."

The documents purporting to be bills of exchange for 5500*l.* and 4812*l.* respectively were sent to Lindsay, who was

then at Lausanne. They both bore the lithographed heading "London." Seeing that as inland bills they were null and void, not being on stamped paper, on February 2, 1928, he struck out "London" from each of the documents and substituted "Lausanne" as the place of origin. Then he added the date December 3, 1927, to each of them, and signed his name as drawer to the second and stamped them as foreign bills. The bills were presented for payment on March 5, 1928, dishonoured, and duly protested.

On February 29, 1928, Sir H. S. Foster brought an action against the syndicate, Lindsay, and Attfield, claiming rescission of the two agreements of October 26, 1927, delivery up of the so-called bill of exchange for 5500*l.*, and declarations (*a*) that he was no longer bound by the said agreement and (*b*) that the said bill of exchange was void. He based his claims upon the allegations (1.) that the whisky had never been delivered according to the contract, since it had never been placed free on board at Leith or Glasgow nor shipped on a steamer of a regular line of steamships, nor had a delivery order from bond been given in respect of it, a delivery order of the goods in bond not being, as he alleged, a delivery order from bond within the meaning of agreement of October 26; (2.) that the so-called bill of exchange for 5500*l.* was, if anything, an inland bill and void, (*a*) because it was not on stamped paper, and (*b*) because Lindsay had materially altered the document by altering "London" into "Lausanne" and inserting December 3 as the date of drawing the bill, which was not the date on which it should have been drawn according to the agreement of October 26. The defendant syndicate delivered no defence. The defendant Lindsay denied that he had committed any breach of the agreement; that if the giving of the delivery order was a breach, the plaintiff was estopped from complaining of it, as he had himself taken a transfer of the delivery order. The defendant further insisted that in the circumstances he was entitled to alter the bills as he had done, and he counterclaimed payment of the said bill for 5500*l.*, or, if the bills were not valid bills, damages for breach of the contract of October 26, 1927,

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in not handing to him valid bills. The defendant Attfield pleaded that the agreement of October 26, 1927, was illegal and void and contrary to public policy in that to the knowledge of all the parties thereto the whisky was to be supplied for the purpose of being shipped to and delivered in the United States of America in violation of the laws of that country.

On March 10, 1928, Lindsay brought an action against Attfield and Sir H. S. Foster as the acceptor and drawer respectively of the bill for 5500*l*. He alleged that in pursuance of the agreement of October 26, 1927, he had on December 1 caused to be delivered to the syndicate the 7500 cases of whisky by handing to them a delivery order from bond for the said goods, and had lent them the sum of 2500*l*.; that the defendant Foster, or the syndicate on his behalf, had handed him two unstamped and undated documents purporting to be bills of exchange for 5500*l*. and 4812*l*. respectively, and that in these circumstances he was entitled to date the said bill for 5500*l*. as of December 3 and to have it stamped as a foreign bill. The defendant Attfield admitted that the bill for 5500*l*. was given in pursuance of the agreement of October 26, 1927, but pleaded that the agreement was illegal and void; and that the said bill and another for 4812*l*. were inland bills and void, and alternatively that, by making material alterations in them, the plaintiff had invalidated them. The defendant Sir H. S. Foster pleaded that the delivery order was given in breach and not in pursuance of the agreement of October 26, 1927, and insisted that the alleged bill for 5500*l*. did not begin to run from December 3; and he relied on the facts and submissions stated and made in his statement of claim in the first action, and pointed out that the claim in the present action was in substance the counterclaim in the former action.

On March 7, 1928, Lindsay brought an action against the syndicate and Attfield as acceptors of the alleged bill for 4812*l*. The syndicate entered no appearance to the writ. Attfield pleaded the same defences as in the second action.

The three cases were heard together. Wright J. held that under the agreement of October 26, 1927, it was Lindsay's

duty to provide the bond to satisfy the officers of Inland Revenue, and that his omission to do this and his action in giving to the syndicate a delivery order for the goods in bond were substantial and material breaches of the agreement and that the bills never began to mature. He therefore gave judgment for Sir H. S. Foster, the plaintiff in the first action, and granted a declaration that he was under no liability on the bill for 5500*l.*; and that he was no longer bound by the agreement of October 26, 1927, by reason of the fact that Lindsay, not having fulfilled the conditions precedent to the provisions in his favour, was debarred from enforcing them. He also gave judgment for Sir H. S. Foster on the counterclaim.

With regard to the second action, Lindsay's claim against Attfield and Sir H. S. Foster on the so-called bill for 5500*l.*, the learned judge held that the document was clearly void as a bill, having been drawn, accepted and indorsed in this country on unstamped paper. In that view he found it unnecessary to decide the other points raised in that action. He therefore gave judgment for the defendants in that action.

With regard to the third action, the claim of Lindsay against the syndicate and Attfield, the learned judge held that, although Attfield was not a party to the agreement of October 26, 1927, nevertheless the so-called bill for 4812*l.* only came to Lindsay's hands upon the conditions to be performed by him under the agreement, and, as he had not performed those conditions, he could not recover on this bill any more than he could upon the bill for 5500*l.* Judgment was therefore given for Attfield.

Lindsay appealed against the judgments in the three actions.

Schiller K.C. and *Macaskie* for the appellant. The learned judge was wrong in holding that the appellant committed a breach of the agreement of October 26, 1927, when he handed the delivery order to the syndicate. He had sold the whisky to the syndicate at a price f.o.b. Leith or Glasgow; the purchasers undertook to accept delivery on board a regular line of steamers, and shipment was to be made not

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later than November 26, 1927. Under this contract it was the duty of the purchasers to name a steamer of a regular line in which to take delivery, and it was probably the duty of the appellant to provide the export bond. The syndicate never did name a steamer, and so the appellant could not deliver in the way provided for by the contract. Further, in order to procure an export licence, a bond in 55,000*l.* would have been necessary. Such a bond might be obtained from an insurance company, but only if the vessel which was to carry the goods was one of a regular line of steamers and if the particular vessel was specified. It was not contemplated by the contract that the appellant or any of the parties should pay the 55,000*l.* in cash to the officers of Inland Revenue. By failing to name a vessel the syndicate prevented the appellant from procuring the necessary bond. Thus they exonerated and discharged the appellant from making delivery according to the contract and accepted a substituted method of delivery. The whisky was to be paid for by bills maturing in ninety days from November 26. If it had been left to the syndicate to perform their part the bills would not have matured to this day. The appellant had sold the whisky and could not get paid. His only course was to deliver the goods in the only practicable way—namely, by giving the syndicate the delivery order, so that the bills might begin to run. He committed no breach of the agreement in doing this. Moreover, the respondent Foster cannot complain, if there was a breach, after having himself taken a transfer of the delivery order, the giving of which is the alleged breach. Therefore the respondent Foster was not entitled to the declaration he claimed. On the other hand, the appellant is entitled to judgment on the counterclaim, either upon the bill for 5500*l.* or, if that bill is invalid, then for damages against the respondent Foster for not giving a valid bill.

With regard to the second action, the claim in this action is in substance identical with the counterclaim in the first action.

With regard to the third action. The so-called bill for 4812*l.* when it reached the appellant at Lausanne had no

drawer's name. It was not an "order in writing addressed by one person to another" within s. 3 of the Bills of Exchange Act, 1882, and therefore it was not a bill of exchange. It was not upon stamped paper, and therefore s. 20, sub-s. 1, does not apply to it. The material sections of the Act are s. 12 (1), which enabled the appellant to insert the true date of issue or acceptance, and s. 64, the effect of which is that the date and place of payment may be altered with the assent of the acceptor. By accepting this unstamped document in blank the acceptors authorized the appellant to convert it into a foreign bill by altering London into Lausanne and to add his own name as that of the drawer, and to add the date. The document then became a bill upon which the appellant was entitled to sue, and he should have had judgment in the third action.

James Dickinson for the respondent Foster. The fact that the syndicate failed in performing their part of the agreement of October 27 did not entitle the appellant to perform his part in a manner different from that provided. A breach of contract by one party does not empower the other to deviate, as the grantee of a right of way may deviate if the way is obstructed. His remedy was to sue for breach of the agreement. His obligation being to deliver f.o.b., by what principle of law can he at his own instance discharge that

(1) Bills of Exchange Act, 1882, s. 12: "Where a bill expressed to be payable at a fixed period after date is issued undated, or where the acceptance of a bill payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly. Provided that (1.) where the holder in good faith and by mistake inserts a wrong date, and (2.) in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course the bill shall not be avoided thereby, but shall operate and be payable as if the date so inserted had been the true date.

Sect. 64: (1.) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorised, or assented to the alteration, and subsequent indorsers. Provided that . . . .

(2.) In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent."

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obligation by giving a delivery order for the goods in bond? It does not avail him to say he had sold the whisky. Until he gave the delivery order he had it in the bonded warehouse under his own control. The obligation of this respondent was to provide a bill when the syndicate received from the appellant a document which would enable them to get the whisky out of bond. As the syndicate never received such a document the obligation of this respondent never attached.

Pritt K.C. and *Harold Simmons* for the respondent Attfield. If the respondent Foster establishes that he never became liable under the agreement of October 26, because the appellant had disqualified himself from suing upon it, this respondent escapes liability for the same reason; for, though he was not a party to the agreement, yet performance of its terms and conditions by those who were parties was the consideration for his accepting the bills; and so he is entitled to judgment in all three actions. Moreover the two bills were invalid; first because they were clearly intended to be inland bills and being written upon unstamped paper were therefore null and void by ss. 2; 37, sub-s. 2, and 38, sub-s. 1, of the Stamp Act, 1891; secondly because the wrong date, December 3 instead of November 26, was added to them. The wrong date was so added before they became bills, so that s. 12 of the Bills of Exchange Act, 1882, does not apply to them; thirdly because the alteration "Lausanne" for "London" was a material alteration: see s. 64, sub-s. 2, of the same Act. But, fourthly, the whole agreement of October 26 was void as against public policy. It was an agreement to sell for importation into and sale in a foreign country goods the importation and sale of which were to the knowledge of the parties illegal in that country. Such an agreement is illegal and void in this country also: *Clugas* v. *Penaluna* (1); *Lightfoot* v. *Tenant* (2); *De Wütz* v. *Hendricks* (3); *Pearce* v. *Brooks* (4); *Ralli Brothers* v. *Compañia Naviera Sota y Aznar.* (5) It may be that, if the

(1) (1791) 4 T. R. 466.
(2) (1796) 1 Bos. & P. 551.
(3) (1824) 2 Bing. 314.
(4) (1866) L. R. 1 Ex. 213.
(5) [1920] 2 K. B. 287.

sale in the foreign country is illegal only because it infringes the revenue laws of that country, an agreement to provide goods for such a sale might not be held invalid in this country: *Holman* v. *Johnson* (1); *Pellecat* v. *Angell.* (2) But even this exception does not commend itself to modern authorities on international law: see Foote, Private International Law, 5th ed. (1925), p. 401; and see per Scrutton L.J. in *Ralli Brothers* v. *Compañia Naviera Sota y Aznar.* (3) And the law of the United States, which the parties knew they would be violating if their adventure succeeded, was not enacted merely for the purpose of revenue.

Dickinson for the respondent Foster was further heard on the question of the illegality of the agreement. He cited *Waugh* v. *Morris* (4) and commented upon *Holman* v. *Johnson* (1) and *Lightfoot* v. *Tenant.* (5)

Schiller K.C. in reply. The agreement of October 27, 1926, was not void. It was a contract for the sale of whisky by the appellant to the syndicate, prima facie a perfectly lawful act. If the delivery was to take place in America it might have been otherwise; but delivery was to be at Leith or Glasgow. The gist of the whole turns upon this: *Holman* v. *Johnson* (6), per Lord Mansfield. There is nothing illegal in the vendor knowing that the goods he sells are to be disposed of in contravention of the fiscal laws of another country: *Pellecat* v. *Angell.* (2) In order to invalidate an English contract on account of illegality, it must be shown that it necessitates the performance in a foreign and friendly country of some act which is illegal by the law of that country: Dicey, Conflict of Laws, 4th ed. (1927), p. 620. The contract is not invalid unless it cannot be performed without a violation of the law. If it can be carried out without such a violation the contract is not void: *Waugh* v. *Morris* (4); *Cargo ex Argos.* (7) This contract might, and probably but for unforeseen events, would have been carried out, and the whole object of the parties

(1) (1775) Cowp. 341.
(2) (1835) 2 Cr. M. & R. 311.
(3) [1920] 2 K. B. 287, 300.
(4) (1873) L. R. 8 Q. B. 202.
(5) (1796) 1 Bos. & P. 551.
(6) Cowp. 341, 343.
(7) (1873) L. R. 5 P. C. 134.

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would have been attained, by landing the whisky in Canada, or in Nova Scotia, and selling it there.

Cur. adv. vult.

Dec. 13. The following written judgments were delivered :—

SCRUTTON L.J. This is a case of great difficulty if the Court has to ascertain the legal results of the complicated facts. My brothers, however, take the view that the whole adventure is illegal and that the Court should set aside the judgment of Wright J., make no order in favour of or against any of the parties, and give no one any costs. While I should like to arrive at the same result, I think that on legal principles, as the adventure could be carried out lawfully or unlawfully, and the parties have not agreed how to carry it out, the Courts can deal with the legal results as if it were carried out lawfully. I therefore endeavour to state the view which I take of the other questions of law which may arise in the case.

The appeals in these three cases arise out of a complicated transaction relating to 7500 cases of whisky which I have no doubt it was expected would ultimately be brought into the United States in breach of the United States laws. A number of parties are concerned and the transaction is not very creditable to any of them, least of all to the member of the British Parliament who plays a prominent part in the story. I refer to Wright J.'s careful analysis of the respective functions of the parties concerned in the transaction, but shortly the position is this. Mr. Lindsay, a Scotch distiller, was to sell 7500 cases of whisky then at Edinburgh at a price of 27*s.* 6*d.* per case f.o.b. Leith or Glasgow. The whisky cost him about 6500*l.* and the total price would be 10,312*l.* 10*s.*, showing quite a satisfactory profit. He was also to provide 2500*l.* for the purchase, equipment and disbursements of a small steamer called the *Wearhome*, to be secured by a first mortgage on the ship and to bear interest, as to the first 1000*l.* at 8 per cent. and as to 1500*l.* at 40 per cent. Though it is not expressly stated, and though the agreement does state that the whisky was to be shipped on a regular liner,

it is obvious that at some stage the whisky was to be transferred to the *Wearhome* for some voyage not described. The nature of the voyage can be gathered from a term in the contract that if a policy for 1000*l.* against the risk of seizure or confiscation of the ship by any Government could not be effected at a premium of 30 guineas per cent. or less, Lindsay and Sir Harry Foster would underwrite the confiscation risk jointly. Lindsay on the face of the agreement was to sell the whisky to Driscoll and Miller trading as the Tower Trading Syndicate. These gentlemen carried on a shipbroking business and were apparently to manage the shipbroking part of the unspecified adventure. They agreed to provide an additional 1600*l.* as funds for the equipment of the *Wearhome* and according to their evidence were ultimately to get about 10,000*l.* out of the profits of the adventure. The price was nominally to be paid by the syndicate. Actually it was to be paid, in the first instance, by two bills. The first bill, part of the subject matter of the first and second actions, was to be drawn by Sir Harry Seymour Foster, M.P., and accepted by James Herbert Attfield. Sir H. S. Foster was a party to the agreement for the sale of the whisky and the purchase and financing of the *Wearhome*; indeed he was "the party of the first part." Attfield was not a party to that agreement. Sir H. S. Foster, in addition to drawing the bill under the agreement, was to lend the syndicate 1000*l.* partly for the deposit on the purchase of the *Wearhome*, with interest at 40 per cent., the loan to be secured by a second mortgage on the *Wearhome*, and was to receive a cover note for 1000*l.* on ordinary marine risks on the vessel. He was also to join Lindsay as underwriter to the extent of 1000*l.* on the ship against the risk of confiscation if this could not be elsewhere insured against at or under 30 guineas per cent. The agreement of October 26 does not mention what he was to get for these services, but they were not charitable. By a separate agreement of the same date the syndicate agreed that out of the first proceeds of the sale of the whisky 11,000*l.* should be remitted to Sir H. S. Foster to be applied, 5500*l.* to meet the bill, 1000*l.* to pay off the mortgage and 4500*l.*

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as remuneration for his services. The balance of the price of 10,312*l.* 10*s.* was to be paid by a bill for 4812*l.* 10*s.* drawn by Lindsay on and accepted by Attfield, Driscoll and Miller. Attfield is the mystery man of the case; he is said to be an ex-schoolmaster, and, though no agreement in writing was produced, was apparently to negotiate the disposal of the whisky on the other side of the Atlantic, for which purpose he intended, in the first instance, to proceed to New York. Canada, Halifax, St. Pierre and the open sea were also suggested as the places where he would operate. There is an agreement providing for his remuneration dated September 14, 1927, by which the syndicate agreed to pay him out of the profits as and when received by them of the "arranged shipment abroad" 2750*l.* for services (unspecified) rendered and to be rendered. Attfield on November 2, 1927, undertook to remit to Sir H. S. Foster "out of the first proceeds of sale of the merchandise" 11,000*l.* There is no express agreement as to the source from which Attfield was to be indemnified for his liability on the bill. Presumably, receiving the sale proceeds, he would take care of himself. There is no express agreement for the remuneration of the syndicate, or for the freight to be paid for carriage on the *Wearhome*, or for the disposal of the balance of the proceeds of sale. In fact the whole arrangement so far as disclosed is extremely odd and unsatisfactory, and I am quite satisfied that the Court has not been told the whole truth, or anything like the whole truth, by anybody concerned.

The difficulties arise partly from the dealings with the two bills constituting the price and the provisions as to when they were due. I have not looked at the negotiations before the agreement but only at the original agreement itself. It appears from clause 2 that "shipment" was "to be made at the earliest possible date and in any case goods to be delivered ex warehouse not later than November 26 next." On the original of the agreement it appears that at first the bills were each to be at ninety days from shipment, to be drawn and accepted on the signing of the agreement, and to be then handed to the solicitors to hold as security till Lindsay

handed over "mate's receipt or shipping documents or delivery order from bond." The bills were then to be dated as at the date of shipment. But this was altered. "Date of shipment" was three times struck out; twice there was substituted November 26, 1927, being the last date for delivery ex warehouse. There was then an express provision that the bills were due ninety days from November 26; but no express provision when they were to be dated except that they were to be drawn and accepted on the signing of the agreement (October 26), and a substituted provision that they were to be handed to Lindsay to hold as security till he handed the specified documents "on or before November 26." The only other agreements which may be material are (1.) an agreement of October 26 between Driscoll, Miller and Sir H. S. Foster, not Lindsay or Attfield, indorsed on the original agreement, extending the date for delivery of the whisky till November 29 and giving an extra day for delivery for every day's delay in handing over the bills. The bills were handed over on October 26, so the extension of delivery of the whisky was three days. There was no alteration as to the date or time for payment of the bills. (2.) An agreement of November 3, 1927, by which the Syndicate gave Lindsay's firm seven days extra for bottling, i.e. delivery. Sir H. S. Foster and Attfield were not parties to this and the extension of time was not used. Nothing was said about the date or time for payment of the bills. What happened in fact was that on October 26 there were handed to Lindsay's representative, Mr. Berry, two documents each on unstamped paper and with no dates, and with a lithographed heading "London." The first purported to be drawn by Sir H. S. Foster and accepted by Attfield for 5500*l.* The second had no drawer's name, but was accepted by Attfield, Driscoll and Miller. If these were to be treated as inland bills, as they were on unstamped paper, they were null and void: Stamp Act, 1891, s. 2; s. 37, sub-s. 2; and s. 38, sub-s. 1. The first bill for 5500*l.* was clearly an inland bill, and was therefore null and void, and to give it was a breach of the agreement, which was to give a valid bill. The second bill had no drawer's

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name. Mr. Lindsay was then in Lausanne, and the bills were sent out to him there. At some date, probably after November 3, the date of the agreement giving seven days extension for delivery of the whisky, he inserted a date of December 3 in the bill, the form of which was "ninety days after date," though the agreement provided for ninety days after November 26. On February 2, 1928, Lindsay took the two bills to the bank, not having inserted his name as drawer, and was told by the bank clerk, if he did not already know, that a London bill was null and void, being on unstamped paper. He thereupon in Lausanne, as part of one and the same transaction, altered "London" to "Lausanne," the place where he was then drawing the bill, and signed his name as drawer. I consider the effect of this later.

The agreement provided for delivery of the whisky f.o.b. on a regular liner on or before November 26, 1927. The reason for this provision was that for spirits to be exported without paying duty the exporter must give a bond in a large sum, in this case some 55,000*l*., that they should not be smuggled back into Great Britain. The Customs would discharge this bond on receipt of a "landing certificate" that the spirits had been landed in a foreign country. Certain security companies furnished such bonds for a small payment, but required that the shipment should be by a regular liner whose owners would not presumably be mixed up in secret transhipments and smuggling the spirits into England. This explains why the spirits were not to be shipped on the *Wearhome* in the first instance, as it would be difficult to get any security company to give a bond in respect of spirits shipped on the *Wearhome*, and Lindsay would not care to give such a bond himself. Shipment "on a regular liner" was therefore specified, and the syndicate would have to provide the ship and the room. A permission to export could not be obtained from the Customs until the ship was named. But the agreement does not provide for what was to happen if the purchasers did not name a ship on November 26, when the whisky was ready for shipment. This is what happened. The *Wearhome* was not ready, and indeed was not ready in the following

February, and the parties had not made up their minds where the regular liner was to take the whisky to in order that it might be put in the *Wearhome*. Dublin was mentioned, and Hamburg, and later Antwerp, but nothing was settled. Lindsay wanted to be sure of payment, and his advisers thought the way to secure this was for Lindsay to give a delivery order to the syndicate which, if accepted by the bonded warehouse, would transfer the property to the syndicate, in which event the bills, they thought, would begin to run. This they thought would be the "delivery order from bond" mentioned in clause 4 of the agreement. Accordingly on November 26, 1927, Lindsay's London office wrote to the syndicate: "Dear Sirs, Referring to my conversation with you on the telephone this morning I beg to confirm having advised you that the 7500 cases of Scotch whisky are ready and that I await your shipping instructions. It is understood now that you will arrange to provide the necessary export bond." It is agreed that Berry was told that the purchasers were not ready to ship, and on December 1 Lindsay's London office sent to the syndicate a document in these terms: "Messrs. The Tanfield Bonding Co., Canonmills, Edinburgh"—which was the bonded warehouse—"Dear Sir, Please deliver to the order of Messrs. The Tower Trading Syndicate, 6 Harp Lane, London, E.C. 3, the undernoted 7500 cases whisky, rent charges to be for their account as from December 1, 1927. Yours faithfully, (Signed) per pro F. A. Lindsay." The syndicate accepted the document, and presented it to the bonded warehouse, who accepted it, and on December 13 acted on an assignment by the syndicate in favour of one Brown. Lindsay's London office informed Foster of the delivery. Foster asked Driscoll if it was in order, and apparently after a conversation was satisfied that it was in order. The syndicate in fact pledged the whisky in question to Arthur Neagle & Co. by assignment of the delivery order; Foster paid off Neagle & Co., had the delivery order assigned to him, and presented it to the keepers of the bonded warehouse, who attorned to him. Foster took on February 21 from the syndicate a first charge on the whisky for any sum

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which he might have to pay on the bill for 5500*l.* and for "all the sums mentioned in our undertaking to you of October 26, 1927," which apparently include the remuneration of 4500*l.* Lindsay has therefore parted with the property in the whisky, but has not been paid for it. The whisky stands in Foster's name, and he has drawn a bill in payment for it, but when the date was approaching on which the bill was alleged to be due Foster's solicitors on February 29, 1928, stated that he was entitled to treat the agreement as at an end "in view of the inability of the other parties to carry out the agreement." A writ was accordingly issued on February 29, 1928, in Foster's name against Driscoll, Miller, Lindsay and Attfield, asking for declarations that he was not liable on the bill or the agreements. Lindsay counterclaimed damages for breach of contract. This is the first action. Lindsay replied with a writ on March 10, 1928, against Foster and Attfield, asking for judgment against both on the bill, and against Foster asking for damages for breach of contract. This is the second action. Lindsay by writ dated March 7, 1928, claimed on the second bill against Driscoll, Miller and Attfield. This is the third action. Wright J., holding that the bill for 5500*l.* was null and void as being on unstamped paper, and that Foster was released from liability on the agreement by the events that had happened, gave judgment for him in the first action for the declarations claimed, and against Lindsay in the second action. In the third action he held that the same considerations which freed Foster on the first bill freed Attfield on the second bill, and, therefore, gave judgment for Attfield without finally deciding (1.) whether the whole transaction was or was not illegal—a point raised by Attfield—or (2.) whether the validity of the bill was affected by the alteration in the place of drawing and by the addition of the date. Lindsay appeals against all three judgments. But Lindsay's counsel in the first and second actions admit that they cannot contend that the bill for 5500*l.*, a subject matter of the first and second actions, being on unstamped paper, is not null and void. So far therefore as the first and second actions are based on the bill, the appeal fails, and as

in the second action Attfield, who is not a party to the agreement, is only sued on the bill, that action and the appeal fail entirely against him. But in the first action Foster claims that he is released from the agreement, and Lindsay, on the other hand, counterclaims against Foster damages for the breach of the agreement; in the second action Lindsay repeats this claim. There remains therefore for decision in the first and second actions the question whether Foster has been released from liability on the agreement, or is liable for damages for some and what breach of the agreement. Foster undoubtedly, in the first instance, broke the agreement, for, having contracted to give a bill, which must mean a valid bill, he did not give such a bill. The learned judge, as I understand his judgment, has held that Foster is released from liability for this breach, and indeed from any liability under the agreement, by the fact that Lindsay has delivered the goods to the syndicate in a way not contemplated by the agreement, and that Foster never assented to this departure from the agreement.

The first question is then whether Lindsay's giving the delivery order to the syndicate is a breach of the agreement releasing Foster from any liability. The agreement includes "delivery order from bond" as one of the documents delivery of which will make the bill effective, in the sense that it is no longer merely a security but an enforceable document. It is suggested that a delivery order of goods "in bond," which does not entitle the transferee to delivery out of bond unless he satisfies the Customs, is not a delivery order "from bond." There is a document which literally satisfies this description, the lower document on the buff form called "Wet goods for exportation." This document is called a "warehouse keeper's order," and in it the Customs officer tells the warehouse keeper "you may deliver," the bond being satisfactory, as testified by the indorsement of a Customs officer This however is not strictly an order to deliver, but a permission, ineffective unless the warehouse keeper has attorned to the applicant. It cannot be obtained unless the applicant names the vessel in which the goods are to be

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shipped and the port of destination. There is evidence that the Customs would have accepted a destination of Canada, and I suppose therefore also of St. Pierre or Bermuda. But if he does name the vessel and port of destination and the vessel is a regular liner Lindsay can and must ship the goods himself, in which case he can deliver the mate's receipt or shipping documents, and does not want any delivery order from bond to satisfy the purchaser. If the purchaser does not name the ship, so that neither a mate's receipt nor shipping documents, nor a permission from the Customs to deliver out of bond can be obtained, it would seem reasonable that the time for payment should begin to run and that delivery of title by a delivery order in bond, which if accepted by the warehouseman would transfer the property in the whisky to the purchaser, should be sufficient to entitle the seller to payment for the whisky which he is only stopped from delivering to a regular liner by the failure of the purchaser to name one. This view provides a security to the seller if the purchaser omits to name a ship; the other view gives the seller no protection, for the warehouseman's order cannot be obtained unless the applicant names a ship. Two independent members of the export spirit trade took the view that "delivery order from bond" covered the document in this case. The learned judge thought their evidence did not prove a trade meaning, and held that the document was not a delivery order from bond and was therefore a breach of the agreement. With all respect to his view I do not think he considered sufficiently the effect of the purchaser's not naming a ship by the contract date, and the probability of a security being provided in this contingency to the seller if he is ready to put the goods at the disposal of the purchaser. I am therefore of opinion that the tender and acceptance of the delivery order in question were justified by the agreement. It is true it leaves the purchaser to get the bond to justify exportation, but this is only because the purchaser has broken his contract by failing to nominate a ship by the contract date. This ground for alleging that liability on the contract has ceased therefore fails; the seller has duly delivered

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the goods to the order of the syndicate, who have accepted delivery.

Another suggested ground of excuse is the agreement between Lindsay and the syndicate giving Lindsay seven days further time for bottling. Foster was not a party to this, but the extension of time was never used, as the whisky was ready on November 26, the original contract date, and was only not delivered because the purchasers had no ship ready. These defences of Foster in my opinion therefore fail, and as he has contracted to give a valid bill and has not done so he is liable in damages for breach of contract. The damages appear to be the amount of the bill. It is true that Foster has no control after the delivery order is given, but neither would he have any control after the shipment on the regular liner contracted for.

But if I am wrong in disagreeing with the judge below on what is a difficult question of interpretation, there remains the question whether Foster by his action has accepted the delivery order as a good tender. He is told on December 2, 1927, of the delivery order to the syndicate. He acknowledges the information, asks Driscoll about it, and has a conversation with him, after which he does nothing. I suspect he knew all about it then, and heard that the goods were not being shipped because the *Wearhome* was not ready, but that the goods had been delivered to the syndicate. He was making inquiries as to the *Wearhome* in the beginning of January. Anyhow he knew by January 11 that the syndicate were in control of the whisky, and before January 18, through his solicitor that the syndicate were raising money on the whisky. Still he did nothing to repudiate the agreement, but on the contrary accepted the title of the syndicate by (1.) taking over Neagle & Co.'s charge on the whisky, or, as he calls it, rescuing the whisky; (2.) by telling Lindsay that as matters were "imperilling the whole venture" he was "taking over control"; and (3.) by taking from the syndicate a charge on the whisky for, amongst other items, the amount of the bill given for the price. I do not see after this how he can say he is not liable to pay for the whisky. He is the owner

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of it but repudiates the price he has agreed to pay for it. On this ground also, if I am wrong on the first ground, I think the claim that the agreement is no longer binding fails. I deal later with the defence of illegality raised by Attfield which one is strongly tempted to accept.

The third action is by Lindsay against Attfield and Driscoll and Miller as acceptors of the second bill. Neither Driscoll nor Miller entered an appearance and judgment was given against them by default. The learned judge has held that Attfield is discharged by the procedure with regard to the delivery order and on the same grounds as those on which he held Foster free from liability on the first bill. Attfield pleaded two additional points: (1.) That the bill was invalid (*a*) by reason of an alteration of the date; (*b*) by reason of an alteration of the place named in the bill as the place where it was drawn or issued. (2.) That the whole transaction was illegal, as to carry it out was illegal by the law of the United States. On these points the judge gave no decision, as he exonerated Attfield on the first ground named. The bill when handed over on October 26 was accepted but had no drawer's name and no date. It had "London" lithographed as its place of origin and was intended to have four British subjects as its parties. If Lindsay had inserted his name as drawer without more the bill would have been invalid as an inland bill on unstamped paper. But the bill was sent to Lindsay at Lausanne and at Lausanne he inserted his name as drawer. He therefore struck out "London," which was not the place where he was completing the bill, and inserted "Lausanne," the true place. This would make the bill a foreign bill and valid. When the document was altered it was not a bill; it was being completed by inserting (inter alia) the true place where it became a bill. I am of opinion that s. 64 of the Bills of Exchange Act, 1882, does not apply to such a transaction, and I take the view of the transaction which makes the bill valid rather than the one which destroys it. The point as to date is more difficult. The contract under which the bill was given, to which Attfield was not a party, describes the bill as one at "ninety days'

sight from November 26," the provision that the ninety days should run from date of shipment having been three times struck out. November 26 was the date by which the seller undertook to have the whisky ready for delivery and by which date it was ready. Subsequent agreements for extension of time for delivery were not utilized, the whisky being ready without any extension of time; and these agreements contain no alteration of the date of currency of the bill. In my opinion the bill should have been dated November 26, 1927. In fact the bill was handed over on October 25 or 26 undated, and Lindsay in Lausanne at some later date inserted the date of December 3, apparently got by disregarding the three day agreement and regarding the seven day agreement already referred to, to neither of which was Attfield a party. Lindsay's people in London thought he should have dated it December 2. It was argued that s. 12 of the Act saved the bill as the date, if wrong, was inserted in good faith by mistake. But in my opinion this section, between immediate parties, does not apply to a case where an agreement provides the date from which the bill is to run, irrespective of the date of the bill, or the sight of the bill, as "ninety days from November 26," and a date which is not November 26 are inserted in the bill as the date from which the ninety days is to run. The date which the section allows to be inserted is the date of issue or acceptance, and Lindsay did not insert either of these dates or intend to insert them. He intended to insert what he thought was the date in the agreements under which the bill was given and did not insert the correct date. This, in my opinion, makes the bill one by which Attfield was not bound, for though I appreciate that the alteration is in his favour, the bill so dated was not the bill which the agreement contemplated he should accept.

The issue of illegality raised by Attfield in all three actions raises questions of some difficulty. The main contract is for the sale of whisky in the British Isles between British subjects for a price to be paid by bills in England. There seems no doubt that this by itself is legal and that the fact

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that the seller knows the buyer intends to smuggle the goods into the United States does not make it illegal: see per Lord Mansfield in *Holman* v. *Johnson* (1), where the seller in Dunkirk knew that the buyer intended to smuggle the goods into England. In this case Lord Mansfield declined to give effect to the laws of his own country. It is different where the seller, besides knowing the purpose, assists in the purpose, as in *Clugas* v. *Penaluna* (2), where the seller in Guernsey packed the goods in such a way as to assist smuggling into England, and Buller J. made this assistance, and Grose J. the collusion, the ground of their decision. I have no doubt that if seller and buyer agreed to ship the whisky into the United States contrary to the laws of that country the contract would not be enforced here: *Ralli's* case (3), not because it was illegal here but as a matter of public policy based on international comity. On the other hand, if the adventure was to import into Canada and there sell to some person with the knowledge that he was going to import into the United States, I do not think, following Lord Mansfield's decision, that the Courts would treat this as contrary to public policy. There is no evidence that such a sale would be illegal in Canada; on the contrary, Mr. Berry states that an export bond would be granted for Canada, though not for the United States. Canada is mentioned as a possible destination in the letters, in the policy on ship, and in the evidence. I take the same view as to a sale with similar knowledge at St. Pierre, a French island off Newfoundland, which is a well known depot for whisky which the purchaser intends to get into the United States if he can, and which is referred to in the evidence as a possible place of sale. The same remark would apply to a sale and delivery on the high seas, either off Halifax or in Rum Row which is outside the territorial jurisdiction of the United States.

The question, and I regard it as a difficult one, is what is the position as regards public policy where the adventure

(1) Cowp. 341. (2) 4 T. R. 466.
(3) [1920] 2 K. B. 287.

may be performed in an illegal way or a legal way? I doubt whether the parties had ever made up their minds as to the way in which the adventure should be performed. If they sold the goods at the high price which would be paid by a person who wanted to get them into the United States, and if they got the price, it was quite indifferent to them whether the buyer succeeded in his object or not. Attfield, the party alleging illegality, who knew a great deal about what was intended to be done, abstains on the ground of illness from giving the Court any information in support of his plea. Foster says he thought there would be a sale at Halifax or St. Pierre, apparently to Attfield. Lindsay heard rumours that Attfield had a permission to import it into the United States, which sounds very improbable. It was known that the buyer was probably going to smuggle the spirits into the United States, but, provided the seller did not agree to help the ultimate buyer in the smuggling, if the seller got his price at the place of sale it would be indifferent to him what the buyer did with the goods. The adventure, it appears to me, could be carried out in a legal way and could be carried out in an illegal way, and the adventurers had not bound themselves to either way. In my opinion the law is correctly stated by the late Mr. Dicey in his work on the Conflict of Laws, 4th ed. (1927), p. 620: "It must, however, be noted that if a contract is an English contract, it will only be held invalid on account of illegality if it actually necessitates the performance in a foreign and friendly country of some act which is illegal by the law of such country." This is I think supported by the decision in *Waugh* v. *Morris* (1), where Blackburn J. says: "We quite agree, that, where a contract is to do a thing which cannot be performed without a violation of the law it is void, whether the parties knew the law or not. But we think, that in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law; and, if this be so, the knowledge of what the

(1) L. R. 8 Q. B. 202, 206, 207, 208.

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law is becomes of great importance." There is a similar passage in *Cargo Ex Argos*. (1)

In my opinion the vital question on this part of the case is whether an adventure to procure in Scotland and deliver whisky by the *Wearhome* to St. Pierre or Halifax or a place on the open sea, where it is intended to sell it to persons who are known to be going to endeavour to smuggle it into the United States, is unenforceable in this country as contrary to public policy. If it will not be enforced in the sense that the Courts will refuse to determine any question arising out of it, I agree with the view taken by my brothers. But in my view such a contract, which is certainly not proved to be illegal by the law of England and Scotland, France, Canada or the high seas where the sale is made, cannot be said to be contrary to public policy without overruling Lord Mansfield's view, which I do not feel able to do. Public policy is a dangerous horse to ride. (2) It must be clearly established, and persons charged with illegality in contravening it must, like other criminals, be given the benefit of any doubt. In my opinion when an adventure, which can be performed both legally and illegally, has not been performed, and the parties have not agreed how it should be performed, the Courts should determine its legal incidents on the assumption that it is to be performed legally, as it can be. The Government departments appear to act on this view by allowing export bonds where the place of destination is Bermuda, Canada, or St. Pierre.

I have not gathered how far my brothers will carry their views. There are 7500 cases of whisky lying in bond at a Scotch warehouse which were to be the subject matter of this adventure. Should the Courts consider the question to whom those cases belong to, and whether the property in them has passed from Lindsay to, the syndicate or Foster, or should the Courts treat the whisky as res nullius, an accursed thing, whose ownership they will not determine and which they

(1) L. R. 5 P. C. 134, 162, 163.

(2) "It is a very unruly horse, and when once you get astride it you never know where it will carry you": per Burrough J., *Richardson* v. *Mellish* (1824) 2 Bing. 229, 252.

will not protect? If they can bring themselves to determine to whom the whisky belongs, is it contrary to public policy that they should say that the proprietor must pay for it, if the property has passed to him under an agreement which he has not performed on his part? In the cases of highwaymen the Courts would hand the property to the true owner. Who is here the true owner? I regret that I am unable to take the view that the difficult questions in this case can be avoided by saying the whole adventure is illegal.

On the view which I take of the case, as explained above, the results should be as follows: In the first action, Lindsay's claim on the bill, and his appeal against the judgment declaring it void, fail. But he succeeds against Foster on his counter-claim for damages for Foster's not giving a valid bill under the contract and he should have judgment against Foster for 5500*l*., the judgment against him in this respect on the claim being set aside. Lindsay has not asked for relief by his notice of appeal against Attfield, who is not a party to the contract, or against Miller or Driscoll, though he has served notice of appeal on them. The result of this tangle is that there should be no costs in the first action either here or below.

In the second action, Lindsay fails in his claim on the bill against both defendants, but succeeds in his claim against Foster for breach of contract, which is the same as his counter-claim in the first action. As between Foster and Lindsay there should be no costs, and the only judgment should be to dismiss the claim on the bill, as Lindsay has already judgment for the breach of contract in the first action. Attfield is not a party to the contract, and is entitled against Lindsay to have the appeal dismissed with costs.

In the third action, Lindsay fails against Attfield on the bill for the reasons given, and Attfield fails in his defence of illegality. While Attfield is entitled to judgment on the appeal, again I think there should be no costs to any one here or below.

But as my brothers think the whole transaction is illegal and one in which the Court can give no relief, the order of the Court will be as proposed by Lawrence L.J.

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LAWRENCE L.J. The evidence led in the three cases under appeal has convinced me that the documents in respect of which relief is sought were documents drawn up for the purpose of dressing up in a legal garb such of the terms of an illegal joint adventure as the parties deemed it prudent to record in writing.

In effect the proceedings now before this Court are proceedings brought to ascertain and enforce the rights and liabilities of the parties inter se in respect of their dealings and transactions as co-adventurers, and the parties are now seeking the aid of the Court to clear up the mess into which they have got themselves owing to the adventure upon which they had embarked having miscarried. No rights of third parties are in question, the bills have not been negotiated, the charge which was created on the whisky in favour of money-lenders has been paid off, and the whisky itself is still in the possession of one or other of the parties. In fact the proceedings seem to me to bear a strong resemblance to the not unfamiliar action in the Chancery Division between partners to wind up the affairs of a partnership formed for a particular adventure. Here the adventure, after having been partially carried out, has come to a premature end.

Wright J. has found that the object of the scheme which brought the parties together was to take advantage of the illicit market for whisky existing in the United States of America, and to make a profit in excess of the ordinary market profit obtainable in this country, by sending whisky either to the United States or to some convenient entrepôt for the United States, involving the necessity of their finding a ship, the whisky, finance and some one in a position to dispose of the whisky on the other side of the Atlantic. The learned judge has however shrunk from giving effect to the consequences which in my opinion flow from such a finding —namely, that the Court ought to decline to entertain the actions and counterclaim.

It is, in my judgment, plainly established by the evidence that by the laws of the United States the importation into that country of alcohol for beverage purposes is prohibited

and made a criminal offence, and that the parties with knowledge of these laws embarked upon their adventure with the object of making a very large profit by importing, or by instigating or aiding and abetting others to import, a considerable quantity of whisky into the United States in violation of the laws in force in that country.

The parties (as might be expected in a case such as this, where they were not previously acquainted with each other and were in wholly different walks of life, and where it would be unwise on their part to record in writing the true object and scope of the partnership) set themselves the by no means easy task of framing documents which should on their face be legal and bear the semblance of ordinary commercial documents and which, it was hoped, would safeguard the individual interests of those who were risking their goods and money in the adventure. In these circumstances it is not surprising to find that the documents which were in fact drawn up and which have formed the principal topic of discussion in the Court below and in this Court, do not (even when pieced together) disclose the true nature of the adventure, or the whole of the terms arranged between the parties. It is settled law, however, that the existence of illegality may be proved by parol evidence notwithstanding the apparent legality of the documents before the Court: *Collins* v. *Blantern* (1); and that if it be proved that a partnership was established for an illegal purpose the parties will not be allowed to escape the consequences of such illegality merely because they have taken care to conceal it: see, for example, *Stewart* v. *Gibson* (2) and *Armstrong* v. *Armstrong*. (3)

The absence in the present case, therefore, of any written record of the arrangements made by the parties as to the disposal of the whisky after it had been shipped on board a regular line of steamships, or as to the part which Mr. Attfield was to take in the adventure, ought not to blind the Court as to the real nature of the transaction or as to the true nature of the documents produced in these proceedings, or induce

(1) (1767) 2 Wils. 341; 1 Sm. L. C., 12th ed. (1915), p. 412.
(2) (1838) 7 Cl. & F. 707.
(3) (1834) 3 My. & K. 45.

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it to treat such documents as if they related to a legitimate commercial transaction.

In view of the contention put forward on behalf of Mr. Lindsay and of Sir H. S. Foster that the adventure, the broad outlines of which I have indicated, was not illegal, and of the further contention put forward on behalf of Mr. Lindsay that he was no party to that adventure, it is necessary to examine the relevant facts somewhat more closely. I recognize from a perusal of the correspondence and of the notes of the evidence that the Court has not been placed in possession of a great deal of what must have taken place at the numerous interviews between the parties and their respective representatives before the agreement of October 26, 1927, was signed; but in my opinion there is ample evidence to enable the Court to arrive at a just conclusion as to the true nature of the adventure upon which the parties embarked and as to the part which each of the co-adventurers was to take in it.

The following summary represents the conclusions which I have reached, founded upon a perusal of the evidence given at the trial and upon the inferences which in my opinion ought properly to be drawn from such evidence. The parties, after having met and agreed to join in the adventure, decided to acquire, equip, and man a special steamer which should convey the whisky across the Atlantic, obviously realizing that in view of the object of the adventure it could not be shipped to its intended destination in a regular line of steamships. Accordingly the ss. *Wearhome* (a small vessel of 600 tons) was acquired, and it was arranged (inter alia) that this vessel should, before starting on her voyage, be insured to the extent of 1000*l.* against risk of forfeiture and confiscation by any government, which insurance was no doubt meant to meet the risk of forfeiture or confiscation by the Government of the United States in the event of her capture by that Government in the course of her mission. In the next place arrangements were made to clear the whisky from the bonded warehouse in Edinburgh where it was lying, without payment of duty in the United Kingdom. Such clearance

involved naming the port of destination which, in view of the object of the adventure, was clearly out of the question; it also involved giving a bond for a large amount to the Customs, a release from which bond could only be obtained on production of a landing certificate issued by the authorities at the port of destination. In the face of these difficulties and of the further difficulty that in any event it would be impracticable to procure a bond from an accredited assurance company at a reasonable rate unless the whisky were shipped from the United Kingdom by a regular line of steamships, the parties obviously realized that they could not load the whisky direct on board the *Wearhome* at any port in the United Kingdom. In order to overcome these difficulties the parties arranged that the whisky should in the first instance be placed on board a regular line of steamships at Leith or Glasgow and conveyed to some handy port outside of, but as close as possible to, the United Kingdom where a landing certificate could be obtained, and that the *Wearhome* should proceed in advance to that port and pick up the whisky on its arrival there and then proceed to convey it to its true destination, where (according to Sir H. S. Foster's evidence) it was to be marketed by Mr. Attfield, who was to receive the proceeds of sale and to distribute them amongst the co-adventurers according to their respective shares and interests.

The part in this adventure taken by Mr. Lindsay (who was a distiller and spirit merchant carrying on business in Perth and London) was as follows. As his contribution to the adventure he was to provide a sum of 2500*l.* to be applied towards the purchase and equipment of the *Wearhome* and 7000 to 7500 cases of whisky, which cases were not to be branded with his usual export marks but were only to bear the shipping marks T T S 1/7500, and were to be placed by him on board a regular line of steamships at Leith or Glasgow, thus throwing upon him the duty of obtaining the export bond. He was also to join Sir H. S. Foster in underwriting the seizure and confiscation risk in default of obtaining underwriters at 30 guineas per cent. or less, which I am not

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surprised to note seems to have been the case. In addition to receiving the cost price of the whisky, 6500*l.*, and repayment of his contribution of 2500*l.*, he was to receive as his share of profits 3812*l.* 10*s.* as well as 8 per cent. interest on 1000*l.*, part of his contribution of 2500*l.* and 40 per cent. interest on the balance of 1500*l.* The documents drawn up to safeguard his interests (in addition to the agreement of October 26, 1927) were a first mortgage of the *Wearhome* (with a policy or cover note for 1500*l.* covering ordinary risks and for 1000*l.* covering the confiscation and seizure risk) to secure the 2500*l.* and interest, and two bills of exchange amounting together to 10,312*l.* 10*s.* to secure the value of the whisky and his profit of 3812*l.* 10*s.* The bills were to be at ninety days' sight from November 26, 1927, one for 5500*l.* was to be drawn by Sir H. S. Foster on and accepted by Mr. Attfield and indorsed to Mr. Lindsay, and the other for 4812*l.* 10*s.* was to be drawn by Mr. Lindsay on and accepted by Mr. Attfield and Messrs. Driscoll and Miller. It will be observed that according to these documents Mr. Lindsay (even if he had reason to treat the 5500*l.* bill as good, which from the later correspondence seems doubtful) had no security whatever for 1000*l.*, part of the value of his whisky, or for the profit which he anticipated making, except the signatures of Mr. Attfield and Messrs. Driscoll and Miller, none of whom were previously known to him or were men in whose financial stability (as admitted by him at the trial) he had reason to believe. All the parties, including Mr. Lindsay, however, anticipated that the adventure would be successfully carried out before Christmas, 1927 (see Mr. Berry's letter to Mr. Lindsay of October 28, 1927), and it is plain that Mr. Lindsay in company with the other parties trusted Mr. Attfield to make a faithful distribution of the proceeds of the whisky, and that he was therefore content to accept the signatures of his co-adventurers on the two bills as evidence of his stake in the adventure, but that he had no real anticipation that the bills would have to be enforced. It is significant in this connection that Mr. Lindsay did not attempt to insure the second bill until the month of January, 1928, when matters

were beginning to look awkward, and was then only able to insure it to the extent of 75 per cent. at a premium of 100*l*. My conclusion is that Mr. Lindsay relied upon the successful completion of the adventure and on the distribution of the proceeds of the whisky before the bills should arrive at maturity, and I do not accept his half-hearted denial when, during his cross-examination, he was asked whether that was not the true position. Further, in view of Mr. Lindsay's admission in the witness box that he had heard that the whisky was going to the United States and that Mr. Attfield or his son Captain Attfield (I am not clear from the notes to which of these he intended to refer) had special facilities for getting the whisky into that country, and in view of the statement in his letter of September 14, 1927, that under no circumstances could the whisky be shipped direct by the vessel which the parties were then intending to purchase, and particularly in the face of his having underwritten the seizure and confiscation policy which described the voyage of the *Wearhome* as being from the United Kingdom or Continent to ports or places in the United States of America or Canada and thence to the United Kingdom, I decline to accept his statements made at the trial that he was not interested in the destination of the whisky and that the matter of confiscation of the *Wearhome* did not interest him. The contention that Mr. Lindsay was not a co-adventurer but was merely selling whisky to Messrs. Driscoll and Miller in the ordinary course of business and was merely making an ordinary investment of 2500*l*. on mortgage on the *Wearhome*, is further negatived by the active part taken by him and his manager Mr. Berry in the somewhat prolonged negotiations between the parties when the details of the scheme were being thrashed out, and by his suggestion to his co-adventurers that 100 cases of the whisky should be sent to Dublin well ahead of the main consignment in order to ascertain whether a proper landing certificate could actually be obtained at that port, and by his manager's insistence upon the importance of this trial shipment being effected with all possible speed; these matters (as well as the large profit he was to receive and the wholly

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inadequate security he was content to accept) all tend to show, if further proof were needed, that Mr. Lindsay was as deeply interested and involved in the adventure as the other co-adventurers. In the result I have no hesitation in concluding that Mr. Lindsay's position was that of co-adventurer and not merely that of a merchant selling the whisky in the ordinary course of his trade to Messrs. Driscoll and Miller, and that he was an active party to the scheme of sending the whisky to the United States to be sold there by Mr. Attfield for the benefit of the partnership.

The part taken by Sir H. S. Foster (who carries on a financial business in the City of Westminster and who admitted in the witness box that all parties including himself were co-adventurers in the adventure) was as follows. He undertook to contribute 1000*l.* towards the purchase of the *Wearhome*, to join with Mr. Lindsay in underwriting the seizure and confiscation risk, in default of underwriters as before mentioned, and to join Mr. Attfield in securing Mr. Lindsay to the extent of 5500*l.* for the cost price of the whisky. His share of profit was to be 4500*l.*, and he was to receive 40 per cent. per annum on his contribution of 1000*l.* until repayment. The documents drawn up to safeguard his interests (in addition to the agreement of October 26, 1927) were a second mortgage on the *Wearhome* for the 1000*l.* and interest, and a written undertaking by Mr. Attfield to remit 11,000*l.* out of the first proceeds of the sale of the whisky for the purpose of meeting the 5500*l.* bill, the repayment of the 1000*l.* and interest, and the payment of the profit of 4500*l.* It will be seen that Sir H. S. Foster trusted entirely for the discharge of his liability on the 5500*l.* bill, for the repayment of his contribution of 1000*l.*, and for his profit of 4500*l.*, to the faithful distribution of the proceeds of sale of the whisky by Mr. Attfield.

In view of the admissions made by Sir H. S. Foster that Mr. Attfield had made a full statement to him as to the part he (Mr. Attfield) would take in the adventure and that he, Sir H. S. Foster, knew, first, that the ultimate destination of the whisky was the United States; secondly, that

Mr. Attfield was going to New York accompanied by his son, Captain Attfield; and, thirdly, that Mr. Attfield was not going to accompany the whisky on the *Wearhome* but was going independently to New York to market it upon its arrival, I do not attach any importance to the vague statements made by Sir H. S. Foster in the witness box that he had heard the ports of Halifax and St. Pierre mentioned, and that it was contemplated that duty might have to be paid at Halifax, and I find it altogether too great a strain on my credulity to believe that Sir H. S. Foster (as stated by him at the trial) was not interested in sending the whisky to New York, and understood that Mr. Attfield had purchased the whisky and intended to take it to the United States and to sell it there without risk to the other co-adventurers, which statement is moreover entirely inconsistent with the written undertaking given by Mr. Attfield to Sir H. S. Foster to remit the 11,000*l.* out of the proceeds to him. Further, it appears from the correspondence that at a later period Sir H. S. Foster was anxious to obtain some security for his share of the proceeds of sale from Mr. Attfield. His request for such security, however, was not acceded to, but was met by a counter-proposal by Mr. Attfield that Sir H. S. Foster or his son should accompany him (Attfield) to New York and see that he did not misapply the proceeds of the whisky. This counter-proposal was declined by Sir H. S. Foster, and ultimately Sir H. S. Foster contented himself with sending a telegram to Mr. Attfield, wishing him "Bon voyage."

The part taken in the adventure by Mr. Attfield (a retired schoolmaster residing at Worthing, in Sussex, and the only party to plead the illegality of the adventure) has to be gathered from the documents and from the oral evidence given at the trial by his co-adventurers, as he did not go into the witness box. It is obvious from what I have stated that he was brought into the adventure on account of the special facilities he professed to have for introducing whisky into the United States. The omission of his name from the agreement of October 26, 1927, is explainable on the ground that he could not well have been made a party to that

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agreement without defining the part which he was going to take in the adventure and without stating the amount of his share of the profits. Presumably however such business men as Mr. Lindsay and Sir H. S. Foster would satisfy themselves as to his ability to effect the introduction of the whisky into the United States (upon which the success of the adventure wholly depended) before they embarked upon the enterprise and risked their goods and money in it. At all events it is plain that Mr. Lindsay and Sir H. S. Foster trusted Mr. Attfield to the extent of being willing to place the whisky at his disposal and to allow him to receive the proceeds, which according to their estimate would amount to a very considerable sum. Mr. Attfield's share in the profits was fixed at 2750*l.*, and the only document drawn up to secure his interest was the letter of September 14, 1927, which contained an undertaking by Messrs. Driscoll and Miller to pay him that sum out of the proceeds when received. As however Mr. Attfield was to handle the whole of the proceeds, he presumably did not trouble much about the form of his security. Although Mr. Attfield attended various interviews, and is admitted by Sir H. S. Foster to have told him the part he would take, the parties have professed a surprising ignorance as to the destination of the whisky and of the manner in which Mr. Attfield proposed to introduce it into the United States.

The part in the adventure taken by Messrs. Driscoll and Miller (who were shipbrokers carrying on business in the City of London under the style of the Tower Trading Syndicate) was as follows. They undertook to find the necessary ship for carrying the whisky across the Atlantic, the purchase price of which was to be paid out of the money provided for that purpose by Mr. Lindsay and Sir H. S. Foster as already mentioned. They were to effect an insurance on the *Wearhome* at Lloyd's for 3500*l.*, of which 1000*l.* was to cover the seizure and confiscation risk. They were also to provide the balance of the money (estimated at 1600*l.*) required for the equipment of the *Wearhome*. As their share of the profits (estimated at 10,000*l.* less expenses 2500*l.*—equal to 7500*l.*

net), they were to get the balance of the proceeds of sale of the whisky and also the *Wearhome* after the claims of their co-adventurers had been satisfied. The documents drawn up to secure their interests in the adventure were the agreement of October 26, 1927, and the bill of sale of the *Wearhome* under which documents they were made the ostensible purchasers of the whisky and of the ship. Messrs. Driscoll and Miller were admittedly wholly impecunious, and I gather that their inability to find the 1600*l.* was the main, if not the only, reason why the adventure miscarried.

In my judgment the irresistible inference from the facts which I have stated is that the object of the parties in embarking upon this adventure was to obtain the large profit, estimated at over 18,000*l.*, which would accrue to them by an illicit sale of the whisky in New York, and that Mr. Attfield's part in this adventure was to effect such a sale and to make the best arrangements he could for getting the whisky into the United States either by running it into that country in the *Wearhome* or by employing rum-runners to effect the importation into that country, or, if necessary, by delivering the whisky to the purchasers outside the United States at such a place, in such a manner, and under such conditions, as would ensure that the purchaser would be able to run it into the United States, and would therefore pay the high price required by the partners. Unless Mr. Attfield were able to accomplish his task in one of these ways, it is difficult to see how he could have obtained the requisite price or any price high enough to justify the expenditure in the purchase and equipment of the *Wearhome* and to secure the realization of anything like the anticipated profits; because it is obvious that the illicit buyer would not hand over the purchase money unless and until he had obtained delivery of the whisky in the United States or at some place outside the United States under the conditions which I have mentioned. On any other hypothesis it appears to me to be impossible to explain why the parties (who practically admitted that the whisky was ultimately destined for the United States) should have gone to the expense of buying

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and equipping the *Wearhome* to take the whisky across the Atlantic instead of shipping it in the usual way at a comparatively trifling expense; should have insured the *Wearhome* against the risk of seizure and forfeiture; should have arranged for having the whisky packed in cases without the usual export marks, and should have been unwilling or unable to name the port or even the country to which they had arranged to ship the whisky.

If the real nature of the adventure be as I have described it, I do not gather that it was seriously disputed by counsel that it would be an illegal partnership, and that none of the documents purporting to define the rights and obligations of the partners amongst themselves would be enforceable in any Court of this country. Although there are numerous instances of illegal partnerships to be found in the reports, I have been unable to find any case in which the facts are similar to the facts of the present case. On principle however I am clearly of opinion that a partnership formed for the main purpose of deriving profit from the commission of a criminal offence in a foreign and friendly country is illegal, even although the parties have not succeeded in carrying out their enterprise, and no such criminal offence has in fact been committed; and none the less so because the parties may have contemplated that if they could not successfully arrange to commit the offence themselves they would instigate or aid and abet some other person to commit it. The ground upon which I rest my judgment that such a partnership is illegal is that its recognition by our Courts would furnish a just cause for complaint by the United States Government against our Government (of which the partners are subjects), and would be contrary to our obligation of international comity as now understood and recognized, and therefore would offend against our notions of public morality. The learned judge seems to have had no doubt that the adventure would have been illegal, and that it would have been his duty to refuse to entertain any claim arising out of or in respect of the partnership agreement, except for the fact that in his opinion the transaction was very obscure

and that the parties who had given evidence appeared uncertain as to what exactly they were intending to do; from which obscurity and uncertainty the learned judge drew the inference that the adventurers might have carried out their adventure by shipping the whisky to some place in Canada, where it would have been sold to perfectly independent and bona fide merchants, who would have been free to run it across the border into the United States or not.

Supposing that in the celebrated case of *Everet* v. *Williams* (Lindley on Partnership, 9th ed., 1924, p. 124) the partners had fallen out after they had made their various contributions to the partnership stock in the shape of horses, saddlery and money, but before they had carried out their real purpose, and that the action had been brought to determine their respective rights inter se in respect of their several contributions instead of their rights in respect of the proceeds of their adventure, would the Court have entertained such an action merely because the partners had not definitely settled the precise manner, time, and place of carrying out their object? Assuredly not: although in such a supposed case it could have been said with just as much force as here that there was no evidence that the partners might not have dealt honestly with their customers on Hounslow Heath for the watches, rings and other goods which they intended to acquire instead of carrying out their real intention of acquiring such goods by highway robbery. Similarly the obscurity and uncertainty in respect to the precise method in which the partners in the present case intended to carry out their object ought not in my opinion to induce the Court to entertain the actions. The obscurity and uncertainty to which the learned judge refers do not go to the root of the illegality, but only have reference to the methods by which the object of the partnership should be achieved. Moreover, for the reasons which I have stated and which I will not repeat, the facts proved at the trial in my opinion negative the inference that the co-adventurers might have had an intention of sending the whisky to Canada and of marketing it there in the ordinary course of trade. In my opinion it is plain

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that these curiously assorted parties never came together for any such innocent and legitimate commercial transaction. Moreover (quite apart from the obvious fact that the parties never contemplated paying duty on the whisky in Canada or elsewhere) I confess that I find a difficulty in appreciating the suggestion made by the learned judge that any perfectly independent and bona fide Canadian wine and spirit merchant (even if he had an idea of running the whisky into the United States) would, for no reason that I can think of, pay a price which, besides paying for the cost of the special steamer, would leave the sellers with the very large profit, which they agreed to share amongst themselves, rather than buy the whisky in the open market at the current market price.

In deference to the arguments of counsel I will refer quite shortly to the principal cases cited in this Court on the question of illegality, though I have not found them of much assistance in arriving at á conclusion whether a partnership constituted under the circumstances of the present case is illegal or not.

In *Ex parte Chavasse* (1) it was held that a joint adventure between subjects of a neutral power for running a blockade established by one of two foreign belligerents against the ports of the other was legal on the ground that (subject to the risk of capture) neutrals may lawfully trade with a belligerent.

In *De Wütz* v. *Hendricks* (2) it was held to be contrary to the law of nations for a person to enter into engagements in England to raise money to support the subjects of a friendly power in hostilities against their government and that no right of action could arise out of any such engagements. In the cases of *Holman* v. *Johnson* (3) and *Pellecat* v. *Angell* (4) it was decided that an action for goods sold and delivered abroad will lie in England notwithstanding that the seller knew that the buyer intended to smuggle the goods into England, provided that the sale was an out and out sale and

(1) (1865) 4 D. J. & S. 655.
(2) 2 Bing. 314.
(3) Cowp. 341.
(4) 2 Cr. M. & R. 311.

that the seller had no further interest in the goods after he had delivered them to the buyer abroad.

In *Clugas* v. *Penaluna* (1) it was held that an inhabitant of Guernsey could not recover in the Courts of this country the price of goods sold by him there if he knew it to be the buyer's intention to smuggle the goods into England and gave him assistance for that purpose.

In *Lightfoot* v. *Tenant* (2) it was held that a bond to secure the price of goods sold and delivered in London by the plaintiff to the defendant, to be shipped by the latter to Ostend and from thence reshipped to the East Indies and there trafficked with clandestinely, could not be enforced, on the ground either that the plaintiff's contract extended to the future destination of the goods or that the goods had been sold by the plaintiff to the defendant for the purpose of enabling the latter to trade with them clandestinely.

In *Waugh* v. *Morris* (3) it was held that although it was the intention of the parties to a charterparty (which stipulated that the ship should load a cargo of hay at a port in France and proceed direct to London) that the hay should be delivered at a particular wharf in the port of London, and although by an Order in Council it had been forbidden to land hay from a French port in the United Kingdom, of which Order in Council however both the contracting parties were unaware, nevertheless the contract was valid, as it had not been made knowingly with the intention to violate the law and could be (and was ultimately) carried out without violating the law.

In *Ralli Brothers* v. *Compañia Naviera Sota y Aznar* (4) it was held that an English contract wholly unobjectionable at the time it was entered into was rendered unenforceable owing to a foreign law having subsequently been enacted which made the performance of an essential term illegal according to the law of the foreign country where it had to be performed.

(1) 4 T. R. 466.
(2) 1 Bos. & P. 551.
(3) L. R. 8 Q. B. 202.
(4) [1920] 2 K. B. 287.

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It will be seen from the foregoing statement of the effect of these cases that they do not really touch the point upon which, in my opinion, the present case falls to be determined.

There only remains to be considered the statement in Dicey's Conflict of Laws, 4th ed., p. 620, that an English contract will only be held invalid on account of illegality if it actually necessitates the performance in a foreign and friendly country of some act which is illegal by the law of such country. I doubt whether the learned author in making this statement had in mind a contract of partnership such as we have here. Be that as it may, however, I am of opinion that, in view of the main object of the contract of partnership between the parties in the present case, it is not saved from illegality merely because the partners may have contemplated the event of not being able themselves to import the whisky into the United States, and may have considered the possibility of having to deliver the whisky to the illicit buyers on the high seas or at such other convenient place as might be arranged between themselves and their buyer consistently with their being able to obtain the high price ruling on the illicit market in which they intended to sell the whisky.

It follows that if the opinion I have expressed as to the illegality of the adventure and as to the consequences of such illegality is right, none of the other questions debated on this appeal arise for decision, and holding the view I do I prefer not to express any opinion upon them.

For the reasons stated I am of opinion that the orders made by the Court below ought to be discharged, and the actions and counterclaim ought to be dismissed without any order as to the costs of any of the parties either in the Court below or in this Court.

SANKEY L.J. It is, in my view, desirable to ascertain the facts of this case before proceeding to any discussion on the many points of law raised.

I have come to a conclusion on the evidence that all the parties concerned were actively engaged in an enterprise

to import whisky into the United States of America. It is not a case where one or other of them merely knew that the whisky was going to the States; they were all working to get it there; Lindsay as the man who was to provide the whisky, Sir H. S. Foster as the man who was to finance it, Miller and Driscoll as the men who were to arrange for the carriage, and Attfield as the man who was to go, if necessary, to New York and arrange for its sale. Moreover, as foreign law is a question of fact, I find that the law prohibiting the importation of whisky into the United States is not a mere revenue law. Many circumstances lead me to this conclusion: the price of the whisky and the anticipated large profits; the joint efforts, as disclosed in the correspondence between Sir H. S. Foster, Miller and Driscoll, to purchase and equip a vessel for the expedition; the fact that there is a clause in the policy signed by Sir H. S. Foster and Lindsay in default of underwriters against confiscation, the rate in clause 7 of the agreement referring to 30 guineas per cent. for insurance; the letters, which I do not propose to read as they have been referred to so often, but merely to enumerate them, of September 14 (1927), September 15, September 23, October 4, October 5, October 17, October 18, October 28, January 16 (1928), January 31, February 1 and February 7; the evidence of Sir H. S. Foster himself and the evidence of Berry on p. 160 of the shorthand note. As a result of these findings I have arrived at the conclusion that the Courts of this country ought not to entertain actions of this character, that the whole adventure was illegal, and that all the actions in the Court below should have been dismissed.

We were referred in the course of the argument to cases arising out of contracts made in one country which ultimately involved a breach of the revenue laws of another country. It appears to me, having regard to the decisions, that such cases stand in a class by themselves and that the principles upon which they proceed are not very germane or applicable to the circumstances where, as here, the foreign law the infringement of which is ultimately involved is not a revenue law at all.

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As, however, the cases were cited, I will deal briefly with them. In *Holman* v. *Johnson* (1) it was held that an action lies for goods sold abroad, in this case at Dunkirk, which are prohibited in England, if the delivery of them be completed abroad, though the vendor knows that they are to be run into England. Lord Mansfield there said: "No country ever takes notice of the revenue laws of another." A similar statement of the law by Lord Abinger will be found in *Pellecat* v. *Angell* (2), where it was held that a foreigner who sells and delivers goods abroad to a British subject may recover the price, although he knows at the time of the sale and delivery that the buyer intends to smuggle them into this country. But, he added, there was a distinction where the buyer takes an actual part in the illegal adventure, as in packing the goods in prohibited parcels or otherwise. There he must take the consequences of his own act, but it has never been said that merely selling to a party who means to violate the laws of his own country is a bad contract. It will be observed that both those cases refer to an adventure where ultimately the revenue laws of England were to be broken and not to an adventure initiated in England where the revenue laws of some foreign country were to be broken. Examples of the latter may be found in a number of cases of which *Simeon* v. *Bazett* (3) is an instance, which arose out of the Continental system inaugurated by Napoleon by his Berlin decree of 1806. Upon these cases, however, I do not think any argument can be founded, for it is well known that it was not thought to be against public policy in England to evade the Napoleonic decree by running British goods into the countries affected by it; indeed, as the event turned out, the effect of the Napoleonic decree was to increase British shipping. The opinion of Lord Mansfield and the cases of *Holman* v. *Johnson* (1) and *Pellecat* v. *Angell* (4) have been severely criticised: for example, Sir Frederick Pollock in his Principles of Contract, 9th ed., 1921, p. 391, says: "This is disapproved by most modern writers as contrary to reason

(1) Cowp. 341.
(2) 2 Cr. M. & R. 311, 313.
(3) (1813) 2 M. & S. 94.
(4) 2 Cr. M. & R. 311.

and justice." Foote's Private International Law, 5th ed., p. 401, states: "Modern writers have . . . . concurred in condemning these decisions, and, though the theory is firmly established in America also, it can hardly be assumed that they will be followed in the event of the question again arising here." The opinion of American writers is expressed as follows: in Kent's Commentaries, 1873 edition, published at Boston, vol. iii., p. *266, the learned author says: "In this country, we have followed the English rule, as declared by Lord Mansfield, to the full extent; and the underwriter is liable for losses in consequence of violation of the trade laws of foreign States, provided he was apprised of the intention, on the part of the insured, to violate such laws, either by the terms of the policy, or the standing regulations of the place to which the vessel is insured, or the known usages of trade. It is certainly," continues the American author, "matter of surprise and regret, that in such countries as France, England, and the United States, distinguished for a correct and enlightened administration of justice, smuggling voyages, made on purpose to elude the laws, and seduce the subjects of foreign States, should be countenanced, and even encouraged by the Courts of Justice. The principle does no credit to the commercial jurisprudence of the age." Story, another American author, in his Conflict of Laws, 8th ed., published at Boston in 1883, p. 338, s. 257, says: "It has been long laid down as a settled principle that no nation is bound to protect or to regard the revenue laws of another country; and therefore a contract made in one country, by subjects or residents there, to evade the revenue laws of another country, is not deemed illegal in the country of its origin. Against this principle Pothier argued strongly, as being inconsistent with good faith and the moral duties of nations. Valin however supports it; and Emerigon defends it upon the unsatisfactory ground that smuggling is a vice common to all nations. An enlightened policy," continues the American author, "founded upon national justice as well as national interest, would seem to favour the opinion of Pothier in all cases where positive

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legislation has not adopted the principle as a retaliation upon the narrow and exclusive revenue system of another nation. The contrary doctrine seems however firmly established in the actual practice of modern nations without any such discrimination, too firmly perhaps to be shaken except by some legislative act abolishing it." Scrutton L.J., in the case of *Ralli Brothers* v. *Compañia Naviera Sota Y Aznar* (1), says: "In my opinion the law is correctly stated by Professor Dicey in his Conflict of Laws, 2nd ed., p. 553, where he says: 'A contract . . . . is, in general, invalid in so far as . . . . the performance of it is unlawful by the law of the country where the contract is to be performed,' and I reserve liberty," said the Lord Justice, "to consider whether it is any longer an exception to this proposition that this country will not consider the fact that the contract is obnoxious only to the revenue laws of the foreign country where it is to be performed as an obstacle to enforcing it in the English Courts. The early authorities on this point require reconsideration, in view of the obligations of international comity as now understood." I respectfully agree with those remarks. I do not think that point was really taken in the recent case of *Sumner* v. *Webb*. (2) In my view the present position of the law is that the mere fact that a vendor of goods knows that the purchaser proposes to run them into a country where they are prohibited by some revenue law is not sufficient to render the contract of sale illegal, but if beyond mere knowledge the vendor actively engages in an adventure to get the goods into such country, the Court will not assist the parties to the adventure by entertaining or settling any dispute between the parties arising out of the contract. Even if these principles as to revenue laws are to stand, I can see no ground for extending them, as it seems to me we must if we decide in favour of the present appellant or, indeed, for holding that they are applicable to the facts of the present case. Two facts differentiate the present case: (1.) The American law which it was proposed to infringe in the present case was no mere

(1) [1920] 2 K. B. 287, 300. (2) [1922] 1 K. B. 55.

revenue law; it was intended to prevent a malum in se rather than a malum prohibitum. (2.) The parties concerned have taken an active part in the adventure, a distinction which the Court dwelt upon in *Pellecat* v. *Angell.* (1). I can find no case which compels this Court to hold that it must or ought to entertain a dispute upon a contract made between parties to further an adventure to break the laws of a foreign State, which as above pointed out are not mere revenue laws. It is true that such a contract has not been made illegal by any English statute, nor does it subject persons making such a contract to the penalties provided, for example, in cases which come under the Foreign Enlistment Act, but none the less I think that the Courts of this country are not bound to entertain such actions in view of the obligations of international comity, as now understood. I think that the Courts are not called upon to assist persons who engage in such adventures in settling differences which may have arisen between them, and that they ought to apply the principle laid down in *Pearce* v. *Brooks* (2) where Pollock C.B. said: "I do not think it is necessary to enter into the subject at large after what has fallen from the Bench in the course of the argument, further than to say, that since the case of *Cannon* v. *Bryce* (3), cited by Lord Abinger in delivering the judgment of this Court in the case of *M'Kinnell* v. *Robinson* (4), and followed by the case in which it was so cited, I have always considered it as settled law, that any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing so supplied." And further on the Chief Baron says (5): "If a person lends money, but with a doubt in his mind whether it is to be actually applied to an illegal purpose, it will be a question for the jury whether he meant it to be so applied; but if it were advanced in such a way that it could not possibly be a bribe to an illegal purpose, and afterwards it was turned

(1) 2 Cr. M. & R. 311.
(2) L. R. 1 Ex. 213, 217.
(3) (1819) 3 B. & Ald. 179.
(4) (1838) 3 M. & W. 434.
(5) L. R. 1 Ex. 221.

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to that use, neither *Cannon* v. *Bryce* (1), nor any other case, decides that his act would be illegal." That may be stating the law too broadly, but in *Waugh* v. *Morris* (2), where it was held that, although it was the intention of the parties, when the charterparty was entered into, to land the hay at London, yet as the contract was not made knowingly with the intention to violate the law, and as it could be carried out (as it ultimately was) without violating the law, it was not void, and the defendant was therefore liable for the demurrage; Blackburn J. said: "We agree that a contract, lawful in itself, is illegal if it be entered into with the object that the law should be violated; if, as it is expressed in *Pearce* v. *Brooks* (3), it is done for the very object of satisfying an illegal purpose, or, as it is expressed in *M'Kinnell* v. *Robinson* (4), 'for the express purpose of a violation of the law.'"

In the present case, in my view of the facts, all the parties concerned were engaged in an adventure which had for its express purpose the violation of the law of the United States. I prefer to adopt the reasoning of Wilmot C.J. in *Collins* v. *Blantern* (5): "Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a Court to fetch it back again." Again in *De Wütz* v. *Hendricks* (6) Best C.J. said: "It occurred to me at the trial that it was contrary to the law of nations . . . . for persons in England to enter into engagements to raise money to support the subjects of a Government in amity with our own, in hostilities against their Government, and that no right of action could arise out of such a transaction." It appears to me that the law is correctly stated in Dicey's Conflict of Laws, 4th ed., p. 618, as follows: "A contract (whether lawful by its proper law or not) is, in general, invalid in so far as . . . . the contract forms part of a transaction which" (as here in my opinion) "is unlawful by the law of the country where the transaction is to take place."

(1) (1819) 3 B. & Ald. 179.
(2) L. R. 8 Q. B. 202, 207.
(3) L. R. 1 Ex. 213, 221.
(4) 3 M. & W. 434, 442.
(5) 2 Wils. 347, 350.
(6) 2 Bing. 314, 315.

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One point remains to be noted. It is urged that where there are two ways of performing a contract, one of which is illegal and another legal (as, for example, an adventure to sell whisky either in the United States of America or in Canada, as here) it is impossible to say that the contract is an illegal one. In my opinion that view is excluded by the facts of the case. Here the adventure was for the express purpose of violating the law of the United States of America. I cannot think that where parties intend to deliver in America, if possible, and take all steps to enable them to do so, that the contract is rendered less obnoxious because they have provided that in a certain event, which by the way has not happened, they will sell the cargo to persons in Canada who may be able to do what they themselves cannot effectuate. As Eyre C.J. said in *Lightfoot* v. *Tenant* (1): "The sale and delivery of goods, nay the agreement to sell and deliver goods is prima facie a meritorious consideration to support a contract for the price. But the man who sold arsenic to one who he knew intended to poison his wife with it, would not be allowed to maintain an action upon his contract. The consideration of the contract in itself good, is there tainted with turpitude, which destroys the whole merit of it. I put this strong case because the principle of it will be felt and acknowledged without further discussion. Other cases where the means of transgressing a law are furnished with knowledge that they are intended to be used for that purpose will differ in shade more or less from this strong case; but the body of the colour is the same in all. No man ought to furnish another with the means of transgressing the law, knowing that he intends to make that use of them."

To sum up, in my view an English contract should and will be held invalid on account of illegality if the real object and intention of the parties necessitates them joining in an endeavour to perform in a foreign and friendly country some act which is illegal by the law of such country notwithstanding the fact that there may be, in a certain event,

(1) 1 Bos. & P. 551, 556.

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alternative modes or places of performing which permit the contract to be performed legally.

For these reasons I am of opinion that the Court should not entertain actions of this character and that judgment should be entered for the defendant in the Court below in all cases, and in respect of the counterclaim brought by Lindsay in Foster's action judgment should be entered on the counterclaim for Foster.

Should I be wrong on this point I think I ought in deference to the arguments which have been addressed to us to state my conclusions on the other issues in the case, though I will do so as briefly as possible. Foster brings an action against Driscoll, Miller, Lindsay and Attfield for a declaration that he is not liable on the bill for 5500*l.* and that the contract of October 26, 1927, is no longer binding on him. It is admitted on all hands that he is not liable on the bill as it was not drawn on properly stamped paper and so infringed the provisions of the Stamp Act, 1891. Neither are we concerned with Driscoll and Miller, who were not represented and did not desire to appear on the appeal. Foster's contention that he is not bound by the contract proceeds on the footing that Lindsay has committed such breaches of it as entitled him, Foster, to be released from it. Lindsay denies this and counterclaims for damages for breach of the contract. He says he committed no breach of the contract, that he was entitled to get a valid bill from Foster, and that, not having got it, he is entitled to damages. In a second action (why it was started is not quite clear), Lindsay repeats his counterclaim in the first action. And in a third action Lindsay sues Attfield on the bill for 4812*l.* 10*s.*, to which Attfield replies with a defence of illegality saying: "The contract was for the sale and purchase of whisky. The said whisky was in fact by agreement between and to the knowledge of all the parties to be supplied for the purpose of being illegally shipped to and delivered in the United States of America contrary to and in violation of the laws of that country, which laws prohibit the importation there of whisky and make such importation a criminal offence." He also

pleads that he is released from liability upon the bill by reason of a material alteration made by Lindsay in the bill. In the first action Foster puts his case as follows: "Lindsay, in breach of the contract of October 26, wrongly delivered the whisky to Driscoll and Miller and therefore I am released from performing my part of the contract." That depends upon the much debated meaning of the words, "delivery order from bond," in clause 4 of the contract. Upon this meaning the judge had the evidence of two witnesses, Mr. Simmons and Mr. Jeffery, whose contention, however, he did not accept when they stated that there was a trade meaning attached to the words. We are therefore thrown back upon what is the proper construction of those words, as Lindsay contends that they entitled him to deliver the whisky to Miller and Driscoll as and when he did under the delivery order of November 30. I have come to the conclusion that Lindsay is right in this contention. The object of the words being inserted in the clause may not be very relevant, but in my view the meaning of them was to give Lindsay a right to deliver the whisky to Miller and Driscoll by a certain date, which was subsequently extended, if the mate's receipt or shipping documents could not be procured by reason of the delay of Driscoll and Miller in providing the ship, a delay which in fact happened. In such circumstances I think Lindsay was entitled under the contract to transfer the whisky to Miller and Driscoll in the way he purported to do and that he committed no breach of the contract in doing so. This being so, the point that Lindsay committed a breach of contract which released Foster from his performance fails, and Lindsay is entitled to say that it was Foster who broke the contract by failure to deliver valid bills. Even if I am wrong on this point there is, I think, abundant evidence that Foster adopted and ratified what had been done and cannot now be heard to rely on the point which he desires to take as to the meaning of the words, "delivery order from bond." The letter of February 1, 1928, from Foster to Lindsay, culminates a long correspondence which leads me to the conclusion I have arrived at, Foster

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Sankey L.J.

saying in that letter: "I find other matters which were holding back and imperilling the whole venture and I have therefore had to take over control." Under these circumstances I think Lindsay would be entitled to damages and the amount would be the amount of the bill in question—namely, 5500*l.*, for which, apart from the point of illegality, I think he should have judgment. This disposes of the first and second actions.

With regard to the third action, assuming Attfield's defence of illegality to fail there remains to be considered the point whether Lindsay has precluded himself from succeeding by reason of his alteration of the date. In my view he has, and that Attfield therefore is entitled to judgment on both grounds. Learned counsel for Lindsay relied upon s. 12 of the Bill of Exchange Act, 1882. In my opinion the onus was upon him to show that that section applies. I do not think it does, because it only refers to a case where no date has been put in a bill and not to a case where the date which had to be inserted in the bill was fixed by some other agreement. It is impossible to gather from the evidence of Lindsay exactly what happened when he did fill in or alter the bill. I think the insertion of December 3, 1927, was wholly unauthorized and it is not a case where there had been merely an omission to date the bill, which would give the holder a right to fill it in. This I think was also the view taken by the learned judge in the Court below.

For the reasons, however, which I have already given the point as to illegality prevails, and I have come to the conclusion, as above stated, that the Court ought not to assist these parties to settle disputes arising out of their abortive attempts to import whisky into the United States of America.

Actions and appeals dismissed.

Solicitors for appellant: *Stikeman & Co.*
Solicitors for Sir H. S. Foster: *William A. Crump & Son.*
Solicitors for J. H. Attfield: *C. Butcher & Simon Burns.*

W. H. G.

KINGSLEY *v.* ADLER.

1929
Jan. 21.

Landlord and Tenant—Rent Restriction—Decontrol—Tenant of whole House—Subsequent long Lease of Part to Tenant—"Dwelling-house"—"Tenant"—Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 2, *sub-s.* 2.

By s. 2, sub-s. 2, of the Rent and Mortgage Interest Restrictions Act, 1923: "Where .... the landlord of a dwelling-house to which the principal Act applies grants to the tenant a valid lease of the dwelling-house for a term ending at some date after June 24, 1926, being a term of not less than two years .... the principal Act shall .... cease to apply to the dwelling-house."

The plaintiff was the landlord and the defendant the tenant of a dwelling-house, containing nine rooms. Subsequently the plaintiff let to the defendant part of the dwelling-house, consisting of six rooms, and forming a separate dwelling-house, for a period of four years terminating after June 24, 1926:—

Held, that within the meaning of the sub-section the plaintiff was the landlord of the part of the dwelling-house let to the tenant, and that the defendant was the tenant, although at the time the four years' lease was granted he was only the tenant of the whole house, and the part consisting of the six rooms was not in existence as a separate dwelling, and that, consequently, that part of the dwelling-house was decontrolled.

Lloyd v. *Cook*, ante, p. 103, followed.

APPEAL from Whitechapel County Court.

The appellant, the plaintiff, Louis Kingsley, was the owner of a dwelling-house, containing nine rooms, at 8 Spital Square, Whitechapel, to which the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), applied. Prior to and at the date of the coming into operation of the Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 Geo. 5, c. 32), on July 31, 1923, the plaintiff was the landlord and the defendant, the respondent, was the tenant of the whole of the dwelling-house. By an agreement dated July 25, 1924, the plaintiff let to the defendant six of the nine rooms for a period of 204 weeks at a rent of 16*s.* per week. In July, 1928, at the expiration of this second tenancy, the plaintiff claimed possession of the above six rooms, whereupon the defendant claimed the protection of the Rent Restriction Acts. The plaintiff contended that the six rooms had become decontrolled by reason of the

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provisions of s. 2, sub-s. 2, of the Rent and Mortgage Interest Restrictions Act, 1923. (1) The county court judge held that the premises had not become decontrolled, because at the date of the granting of the lease on July 25, 1924, the defendant was not the tenant of the dwelling-house of six rooms, the dwelling-house in question, but was tenant of the larger premises, the whole house.

The plaintiff appealed.

Doughty K.C. and *E. G. Kimber* for the plaintiff. The county court judge was wrong. "Tenant" in s. 2, sub-s. 2, of the Rent and Mortgage Interest Restrictions Act, 1923, means the sitting tenant. It was only necessary for the purposes of the Act to deal with the sitting tenant, for in the case of a stranger the landlord could have himself brought about decontrol by getting possession of the premises prior to letting them to the stranger. But this would not be so in the case of the sitting tenant, so that the sub-section was necessary. This is not forcing decontrol on the sitting tenant. He can always refuse to take a long lease, and is in a position to make a bargain before doing so.

[*Bartram* v. *Brown* (2) was referred to.]

"Dwelling-house" in the sub-section includes the whole house or any part of it—namely, these six rooms—which constitutes a dwelling-house. The plaintiff, at the date of the making of the long lease, was landlord of the whole house; therefore he was landlord of the part of it, the six rooms, because the greater includes the less. It is said that he was not the landlord of the part, because at that time the six rooms did not form a separate dwelling-house. But in *Lloyd* v. *Cook* (2) it was held that "landlord" does not necessarily imply the existence of a tenant or tenancy. "A" dwelling-house

(1) Rent and Mortgage Interest Restrictions Act, 1923, s. 2, sub-s. 2: "Where, at any time after the passing of this Act, the landlord of a dwelling-house to which the principal Act applies grants to the tenant a valid lease of the dwelling-house for a term ending at some date after June 24, 1926, being a term of not less than two years, or enters into a valid agreement with the tenant for a tenancy for such a term, the principal Act shall, as from the commencement of the term, cease to apply to the dwelling-house. . . ."

(2) Ante, p. 103.

at the commencement of the sub-section is the same dwelling-house as "the" dwelling-house in the latter part. Therefore the plaintiff, the "landlord" of a dwelling-house, the six rooms to which the Act of 1920 applied, granted to the defendant, the tenant of that dwelling-house, the long lease in question; consequently, that dwelling-house thereby became decontrolled, and the plaintiff is entitled to possession.

[*Cohen* v. *Gold* (1) was also referred to.]

Constantine Gallop for the defendant. Sub-s. 2 enacts that where the landlord grants a two years' lease to "the" tenant —i.e., grants it to one already in existence before the long lease is granted, that is to say, the sitting tenant; the parties must already be in contractual relation with each other. And that relation must be in respect of the same subject-matter as the subject-matter of the long lease, for "dwelling-house" must refer to the same dwelling-house wherever it is mentioned in the sub-section; it cannot mean one dwelling-house in one part of the sub-section and another in another part. And "a dwelling-house" at the beginning of the sub-section means that dwelling-house of which the tenant is tenant—namely, the dwelling-house in existence at the time of the granting of the long lease. But the dwelling-house in question, the six rooms, was not then in existence but was created by the long lease. On the plaintiff's construction the tenant might be any one who happened to have an interest in any part of the structure.

Doughty K.C. replied.

SHEARMAN J. Once again, in the year of grace 1929, we have an entirely new point under the Rent Restrictions Acts, and in my view a point of some considerable difficulty; but I think we are freed from the task of deciding which of two possible constructions is right by reason of decisions of the Court of Appeal which we are bound to follow.

The short point in this case is under s. 2, sub-s. 2, of the Rent and Mortgage Interest Restrictions Act, 1923. The plaintiff claimed certain rights, and the defendant claimed the benefit of the Rent Restrictions Act. The plaintiff's

(1) [1927] 1 K. B. 865.

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reply was: You cannot claim them, because these premises are now decontrolled. The claim was in respect of six rooms in a house in Spital Square, which contained nine rooms. The facts that are of importance are that before and up to the time when the Act of 1923 came into force, that is July 31, 1923, the plaintiff was the landlord of the whole of this house, the nine rooms, and the defendant was the tenant in possession and had protection with regard to the whole house. Subsequently, as the result of proceedings and bargaining, an agreement was entered into, valid at common law for good consideration, under which the tenant agreed to give up possession of the ground floor and to remain in possession of six rooms for a period of four years. Subsequently, when at the expiration of this tenancy the plaintiff claimed possession of these six rooms, the tenant claimed the protection of the Act, and the landlord said: "No, the premises on which we are disputing, that is to say the dwelling-house consisting of these six rooms, are decontrolled." As regards the other rooms, I have no doubt that they also were decontrolled, because the plaintiff came into actual possession of them.

The dispute we have to decide is: Are these six rooms decontrolled in these circumstances? By s. 2, sub-s. 2, of the Rent and Mortgage Interest Restrictions Act, 1923, it is provided: "Where, at any time after the passing of this Act, the landlord of a dwelling-house"—"a dwelling-house" are the words—"to which the principal Act applies grants to the tenant a valid lease of the dwelling-house for a term ending at some date after June 24, 1926, being a term of not less than two years, or enters into a valid agreement with the tenant for a tenancy for such a term, the principal Act shall, as from the commencement of the term, cease to apply to the dwelling-house." We have to decide whether the plaintiff was, in respect of this dwelling-house, the landlord of a dwelling-house who had granted a lease to "the tenant." The learned county court judge was of opinion that he had not granted a lease to the tenant, because the tenant mentioned had only been a tenant of the larger premises.

Now, it is well settled that a lease to a stranger does not decontrol a house, because, as is explained by the learned judges of the Court of Appeal in *Bartram* v. *Brown* (1), in his case decontrol can be obtained in another way, while the " sitting " tenant is in the position of having something with which to bargain—namely, his continued right to avail himself of the Act—and if the defendant had been a stranger it is agreed that this section would not apply. It is argued on his behalf that he was not " the tenant " within the meaning of s. 2, sub-s. 2, because at the time when the lease was entered into he was not the tenant of the six rooms ; the only tenancy he had was of the whole house, that is to say of the nine rooms. That is a formidable argument, but I think it is met by the judgments of the Court of Appeal in the case of *Lloyd* v. *Cook*. (2) I do not want to quote them at length. *Lloyd* v. *Cook* (2) was one of the cases which followed *Cohen* v. *Gold* (3), and was taken up for consideration to the Court of Appeal. It was argued there that the word " landlord " in this section must mean a landlord who has at the time a tenant. I do not propose to read the judgments of the three learned judges in the Court of Appeal ; I prefer to go no further than the headnote, which says that it was held by all the judges " that ' landlord ' in s. 2, sub-s. 1, of the Act of 1923 "—and obviously equally in s. 2, sub-s. 2—" does not necessarily imply the existence of a tenant or tenancy, but that a freeholder who has never let the dwelling-house to a tenant, or who has no tenant, may be a landlord within the meaning of the subsection." In the separate judgments I think all the judges, certainly Scrutton and Sankey L.JJ., go on to say that " landlord " includes the person who is suing as a landlord in the suit in respect of a dwelling-house which is the subject of the litigation, and practically means the owner in respect of a disputed tenancy.

That being so it seems to me to follow that when we come to construe this Act, beginning with the words " grants to

(1) Ante, pp. 103, 132. (2) Ante. p. 103.
(3) [1927] 1 K. B. 865.

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the tenant a valid lease of the dwelling-house", it must be read in this way: "Where, at any time, the landlord of a dwelling-house"—this was a dwelling-house—"grants to the tenant a valid lease of the dwelling-house", "the dwelling-house" must be the same house as "a dwelling-house" which is mentioned at the beginning of the section, to wit in this case these six rooms. I think it is clear, on the reasoning of the Court of Appeal in *Lloyd* v. *Cook* (1), that "the tenant" means the tenant of the dwelling-house, namely, these six rooms, and the defendant was the sitting tenant of these six rooms at the time that the contract of letting was entered into. It follows, to my mind, therefore, that the landlord could rightly claim under s. 2, sub-s. 2, of the Act of 1923, that these premises were decontrolled; and it is admitted that if they were he was entitled to succeed in this action. As I say, I think the words of the sub-section might have been open to both constructions, but I think we are in effect bound by authority to decide in the way we have done; and, indeed, apart from authority our decision represents my own opinion.

ACTON J. I agree. Beyond a doubt, in the present case the plaintiff was before July 25, 1924, the landlord, and the defendant was the tenant of the whole house in question in this case. The agreement of July 25, 1924, did not, however, relate to the whole house of which the defendant had theretofore been tenant and the plaintiff landlord, but to six rooms only, those six rooms forming a part of the whole house. Mr. Gallop's argument for the defendant was that, in these circumstances, in order that this appeal should succeed, s. 2, sub-s. 2, of this Act, which provides: "Where . . . . the landlord of a dwelling-house to which the principal Act applies grants to the tenant a valid lease of the dwelling-house for a term ending at some date after June 24, 1926" there is to be decontrol must be read as though the actual wording were: "Where the landlord of a dwelling-house grants a valid lease of the dwelling-house or any part thereof";

(1) Ante, p. 103.

that inasmuch as those words " or any part thereof " are not to be found in this sub-section, it is impossible to read them in ; and that on the proper construction of the section the expressions " a dwelling-house " and " the dwelling-house " have relation to the same premises, and that unless the whole of that dwelling-house of which the landlord was landlord is let under the agreement " for a term ending at some date after June 24, 1926," the premises do not become decontrolled, and accordingly the landlord cannot recover possession.

In my view the difficulty may be met, and is met in this way, that in the circumstances of this case the plaintiff landlord may be said to have been a landlord of a dwelling-house—videlicet the six rooms which formed the subject-matter of the agreement of tenancy of July 25, 1924—although at that date there was no agreement of tenancy relating to the six rooms apart from the remainder of the whole of the house which had originally been let. If that is a reading which can be put in these circumstances upon the expression " the landlord of a dwelling-house to which the principal Act applies " it seems to me that the difficulty disappears, because then the way in which the section is to be read as applicable to the present case is as follows : " Where at any time after the passing of this Act the landlord of a dwelling-house, to wit six rooms forming a portion of a dwelling-house, grants to the tenant a valid lease of the dwelling-house, to wit the same six rooms already referred to," the premises become decontrolled, and the landlord accordingly acquires the right to do what he sought to do in his action in the present case. It seems to me that that is the crux of the whole matter, and that when that point has to be considered in view of what was held by the Court of Appeal in the five appeals (1) it is in my view reasonably clear that the words of this sub-section may be construed in the way in which I have indicated, for there it was held by the Court that " landlord " in s. 2, sub-s. 1, of this Act, " does not necessarily imply the existence of a tenant or tenancy, but that a freeholder who has never let the dwelling-house

(1) Ante, p. 103.

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to a tenant, or who has no tenant, may be a landlord within the meaning of the sub-section "—see the headnote. (1) I think it may also be said that under sub-s. 2 of the same section it is quite permissible to say, in circumstances such as these, that the landlord was the landlord of a dwelling-house, to wit six rooms, and that it is not necessary to insist that the sub-section can have no application unless it can be shown that the agreement which must expire not later than June 24, 1926, has relation to the whole of the dwelling-house which had in the first instance been let by the plaintiff landlord to the defendant tenant.

I therefore agree that this appeal should be allowed.

Appeal allowed.

Solicitor for plaintiff: *H. A. Phillips.*

Solicitors for defendant: *Adler & Perowne.*

(1) Ante, p. 103.

W. L. L. B.

FARNWORTH *v.* LORD MAYOR, ALDERMEN AND CITIZENS OF THE CITY OF MANCHESTER.

C. A.
1928
Nov. 13, 14, 15, 16;
Dec. 13.

[1926. F. 1634.]

Electric Light—Nuisance—Generating Station—Fumes from Chimneys—Supply of Electricity—Special Act—Electric Lighting (Clauses) Act, 1899 (62 & 63 *Vict. c.* 19), *s.* 1; *Schedule, s.* 81—*Manchester Corporation Act*, 1914 (4 & 5 *Geo.* 5, *c. cxlvi.*), *ss.* 32, 33, 36.

By s. 32 of the Manchester Corporation Act, 1914, the Corporation was empowered to erect work and use on land outside their area of supply a station for generating electrical energy, and by s. 33 to make and use electric lines commencing at the generating station and terminating at a point within their area of supply.

By s. 1 of the Electric Lighting (Clauses) Act, 1899, the provisions contained in the Schedule to the Act are to be incorporated within any special Act, save as expressly excepted thereby; and "special Act" is defined as being: "Any Act . . . . authorizing the supply of electricity for any public or private purposes within any area." By s. 81 of the Schedule to the Act it was provided that nothing in the special Act should "exonerate the undertakers from any . . . . action or other proceedings for nuisance in the event of any nuisance being caused or permitted by them."

The Corporation erected a large generating station from the chimneys of which, in the process of generating electricity, quantities of sulphuric acid were emitted which were a nuisance to the land of a neighbouring farmer.

In an action by the farmer against the Corporation:—

Held, by Lawrence and Sankey L.JJ. (Scrutton L.J. dissenting), that the Manchester Corporation Act, 1914, was not a "special Act" within the meaning of s. 1 of the Electric Lighting (Clauses) Act, 1899, and that s. 81 of the Schedule to that Act therefore did not apply; but

Held, on the facts by Scrutton and Sankey L.JJ. (Lawrence L.J. dissenting), that the defendants had failed to discharge the burden, which lay on them, of showing that the damage done to neighbouring landowners was necessarily incidental to the exercise of the powers conferred on them by s. 32 of their Act of 1914, and that they were therefore liable.

Judgment of Talbot J. reversed.

APPEAL from the judgment of Talbot J. in an action tried before the learned judge without a jury.

The plaintiff was the occupier of a farm at Barton-upon-Irwell in the county of Lancaster. He brought an action against the defendants for a nuisance caused by them in using a large station which they had erected for generating electricity. In working their dynamos and machinery they

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consumed daily about 500 tons of coal, and the chimneys of the station emitted fumes charged with sulphur to the amount of 11 tons a day, a great part of which fell upon the plaintiff's land and seriously damaged it. The plaintiff was not the only farmer whose land was affected. It was admitted at the trial that, unless the defendants could show that their acts were authorized by statute, an actionable nuisance had been committed.

The station was erected under s. 32, sub-s. 1, of the Manchester Corporation Act, 1914 (1), which expressly

(1) Manchester Corporation Act, 1914 (4 & 5 Geo. 5, c. cxlvi.), s. 32, sub-s. 1: "The Corporation may erect construct maintain alter improve enlarge extend renew work and use: (A) Upon the lands delineated on the deposited plans described in the deposited book of reference and hereinafter described a station for generating electrical energy together with such buildings engines works dynamos accumulators and other plant and machinery matters or things of whatever description as may be necessary or convenient to enable the Corporation to generate and supply electricity. . . . ."

Sect. 33, sub-s. 1: "The Corporation may in the lines shown on the deposited plans and where levels are shown on the deposited sections according to those levels make maintain alter improve enlarge extend renew and use the works hereinafter mentioned with all proper and necessary works and conveniences in connexion therewith (that is to say) . . . . (D) Electric lines as defined in the Electric Lighting Act, 1882, commencing at the generating station authorized by this Part of this Act and terminating in the City at the bridge carrying Cornbrook Road over the Bridgewater Canal."

Sect. 36: "(1.) The whole or any part of the areas for the supply of electricity by the Corporation under the Manchester Electric Lighting Order, 1890, and any subsequent Acts and Orders may be supplied with electrical energy from all or any of the generating stations of the Corporation for the time being including those now existing and the station authorized by this Part of this Act.

(2.) The Corporation may by means of electric mains make connexions between the existing generating stations or areas of supply of the Corporation and the generating station authorized by this Part of this Act.

(3.) The Corporation may also by means of electric mains make connexions between any two or more areas which they are authorized to supply or between any such area and any generating station of the Corporation.

(4.) The Corporation may also by means of electric mains make connexions between the generating station authorized by this Part of this Act and the sewage works of the Corporation situate in the township of Davyhulme in the rural district of Barton-upon-Irwell and may transmit electricity by such mains for use by the Corporation upon the said sewage works but for no other purpose.

(5.) In relation to any such electric mains as aforesaid the Corporation

empowered the defendants to erect construct and maintain work and use on the land therein described a station for generating electricity, with such buildings engines dynamos and other plant as might be necessary or convenient for that purpose. The defendants relied upon this statute as authorizing the acts which caused the nuisance.

The plaintiff replied that by s. 1 of the Electric Lighting (Clauses) Act, 1899, the provisions in the Schedule to that Act were to be incorporated with any "special Act"; that "special Act" meant any Act thereafter passed authorizing the supply of electricity for public or private purposes within any area; that the Manchester Corporation Act, 1914, was a "special Act" within the meaning of s. 1 of the Electric Lighting (Clauses) Act, 1899, and therefore incorporated the provisions in the Schedule to that Act; that s. 81 of the

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(A) with respect to streets in any area which they are authorized to supply shall have the powers and be subject to the provisions of the Acts and Orders relating to their powers of supply in that area; and (B) with respect to streets not within any area which they are authorized to supply shall have the powers and be subject to the provisions of the Electric Lighting Act, 1882, and of ss. 10 to 20, 60 to 62, 69 to 73, 76, 77, and 79 to 82 of the Schedule to the Electric Lighting (Clauses) Act, 1899, and those provisions so far as applicable but subject to the provisions of this section shall for the purposes of this section be incorporated with this Act and shall have effect and the Corporation shall be deemed to be the undertakers."

Electric Lighting (Clauses) Act, 1899, s. 1: "The provisions contained in the Schedule to this Act shall be incorporated with and form part of every Provisional Order made by the Board of Trade after the commencement of this Act under the Electric Lighting Acts, save so far as they are expressly varied or excepted by the Order, and shall, subject to any such variations or exceptions, apply, so far as applicable, to the undertaking authorized by the Order.

"The said provisions shall also, with the necessary modifications, and in particular with the substitution of the words 'special Act' for 'special Order,' be incorporated with any special Act, save so far as they are expressly varied or excepted thereby.

"The expression 'Electric Lighting Acts' means in this Act the Electric Lighting Acts, 1882 and 1888, ...

"The expression 'special Act' means in this Act any Act passed after the commencement of this Act authorizing the supply of electricity for any public or private purposes within any area."

The Schedule, s. 81: "Nothing in the special Order shall exonerate the undertakers from any indictment, action, or other proceedings for nuisance in the event of any nuisance being caused or permitted by them."

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Schedule to that Act, when read as directed by s. 1 of the same Act, provided that nothing in the special Act should exonerate the undertakers from any action for nuisance in the event of any nuisance being caused or permitted by them.

Secondly, the plaintiffs contended that if the Manchester Corporation Act, 1914, was not a "special Act" within the meaning of s. 1 of the Electric Lighting (Clauses) Act, 1899, still the defendants were liable, unless they showed that the nuisance was necessarily incidental to a reasonable exercise of the powers conferred upon them by s. 32 of the Act of 1914; that the burden of showing this lay upon the defendants, and they had not discharged it.

The learned judge held that the Act of 1914 was not an Act "authorizing the supply of electricity . . . . within any area," in the words of s. 1 of the Electric Lighting (Clauses) Act, 1899; and therefore not a "special Act" within that section so as to incorporate s. 81 of the Schedule to that Act. He also held that the defendants had been guilty of no negligence or default in the erection or user of the generating station. He therefore gave judgment for the defendants.

The plaintiff appealed.

Singleton K.C. and *Laski* for the appellant. The Manchester Corporation Act, 1914, authorizes the supply of electricity for public and private purposes within the city of Manchester: see s. 33, sub-s. 1, and s. 36. It is therefore a special Act within the meaning of the Electric Lighting (Clauses) Act, 1899, s. 1, and incorporates s. 81 of the Schedule to that Act making the respondents liable for nuisance caused or permitted by them. This case is on all fours with *Midwood* v. *Manchester Corporation* (1), where the Corporation was held liable under a Provisional Order containing a clause in the same terms as s. 81 of the Schedule to the Act of 1899.

Secondly, it may be conceded that, if the special Act authorized the erection of a specified generating station, a nuisance, which was the necessary result of erecting it, would not be actionable. But what is authorized is "a station

(1) [1905] 2 K. B. 597.

for generating electrical energy." There is no evidence that a nuisance is the necessary result of erecting a generating station. The evidence shows that the respondents took no thought for the rights of neighbouring landowners until this station was erected and in full work, and the nuisance an existing subject of complaints; and that a nuisance like that in the present case is not known of elsewhere.

Cyril Atkinson K.C., *Tyldesley Jones K.C.* and *S. G. Turner* for the respondents. The Manchester Corporation Act, 1914, is not a special Act within the meaning of s. 1 of the Electric Lighting (Clauses) Act, 1899. It is not an Act "authorizing the supply of electricity for any public or private purposes within any area," in the words of that section. The respondents had authority to supply electricity within their area long before the Act of 1914. That Act authorized the erection of a station for generating electrical energy. The current generated leaves the station at a pressure of 33,000 volts, which has to be transformed before it can be used for any purpose, public or private. Moreover the provisions contained in the Schedule to the Electric Lighting (Clauses) Act, 1899, are only incorporated in a "special Act" in so far as they are not "expressly varied or excepted" by the special Act. The respondents' Act of 1914 contains s. 37 "for the protection of the Trafford Park Estates, Ld.," and provides that the respondents are not unreasonably to obstruct the free access to the Bridgewater Canal by owners and occupiers of land in Trafford Park. It also contains ss. 38, 39 and 40, which for the protection of the owner of Trafford Park and others, expressly apply s. 81 of the Schedule of the Electric Lighting (Clauses) Act, 1899, to works constructed by the respondents. These sections were unnecessary if s. 81 of the Schedule to the Act of 1899 was already incorporated in the respondents' Act of 1914.

Singleton K.C. in reply. Clauses for the benefit of private persons inserted in a local Act have no effect on the interpretation of the general clauses of the Act: *East London Ry. Co.* v. *Whitechurch.* (1)

(1) (1874) L. R. 7 H. L. 81, 89.

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On the question whether the respondents had misused or negligently used their statutory power, the following cases were cited and discussed: *Attorney-General* v. *Birmingham Corporation* (1); *Hammersmith Ry. Co.* v. *Brand* (2); *River Wear Commissioners* v. *Adamson* (3); *Geddis* v. *Bann Reservoir Proprietors* (4); *Metropolitan Asylum District* v. *Hill* (5); *Canadian Pacific Ry. Co.* v. *Parke* (6); *London, Brighton and South Coast Ry. Co.* v. *Truman* (7); *Scottish Drainage Co.* v. *Campbell* (8); *Shelfer* v. *City of London Electric Lighting Co.* (9); *Midwood* v. *Manchester Corporation* (10); *Charing Cross Electricity Supply Co.* v. *London Hydraulic Power Co.* (11); *Price's Patent Candle Co.* v. *London County Council* (12); *Quebec Railway, Light, Heat and Power Co.* v. *Vandry.* (13)

Cur. adv. vult.

Dec. 13. The following written judgments were delivered :—

SCRUTTON L.J. The appellant, Mr. Farnworth, who has farmed land in Barton-upon-Irwell, as did his father and grandfather before him, brings an action against the Manchester Corporation for nuisance. The nuisance consists in the facts that the Corporation have erected a very large generating station for the production of electricity for use in the city of Manchester and other areas which the city controls; that the station burns about 500 tons of coal a day, and the fumes of the burning coal contain 11 tons of sulphur a day, which drops down on the appellant's land and seriously damages it. The nature of the nuisance is well shown by the report to the Corporation on May 19, 1924, by the chief engineer and manager of their Electricity Supply Department. It is as follows: "Several complaints have been recently received from tenant farmers in the vicinity

(1) (1855) 4 K. & J. 528.
(2) (1869) L. R. 4 H. L. 171.
(3) (1877) 2 App. Cas. 743.
(4) (1878) 3 App. Cas. 430.
(5) (1881) 6 App. Cas. 193.
(6) [1899] A. C. 535.
(7) (1885) 11 App. Cas. 45.
(8) (1889) 14 App. Cas. 139.
(9) [1895] 1 Ch. 287.
(10) [1905] 2 K. B. 597.
(11) [1914] 3 K. B. 772.
(12) [1908] 2 Ch. 526.
(13) [1920] A. C. 662.

of the power station alleging damage to crops from the fumes emanating from the boiler house chimneys. It has been observed that, under certain atmospherical conditions, the gases discharged from the chimneys appear to drop quickly to the ground, instead of being dissipated into the upper strata of the air, thus causing a higher degree of concentration of the products of combustion on the surrounding farm lands. This phenomenon is one apparently peculiar to Barton, and from careful inquiries made I can find no precedent. It may be due to several factors, one of which is the height of the chimneys, and, by way of experiment, an extra 20 feet is being added, and the results will be noted. Another cause may be the lower temperature at which the gases are discharged. In view of the large amount of plant installed at Barton, it can hardly be expected that the surrounding lands will remain entirely free from the products of combustion discharged from the chimneys." Its peculiar character also appears from the evidence of Mr. Selvey, one of the defendants' expert witnesses. Having been with Messrs. Merz for some years, he came across a number of power stations. This was the only case where he had known damage of the character complained of. He could not account for it. He did not know, and, to quote his own words, "we all want to know," why the fumes caused damage in this case and in no other case. There might be: (1.) damage, but no complaint, or (2.) something which does damage at these works and no other works, or (3.) something in the method of working, or (4.) climatic conditions, the damp character of Manchester air, or (5.) something in the configuration of the ground. As to damp air, the chief engineer wrote on April 4, 1924: "We have never met with trouble of this character before at any of our power stations, although the conditions from the point of view of humidity of atmosphere are far worse than they are at Barton." The fact seems pretty clear that the generating station using coal, of the quality and sulphur content of which the appellant does not complain, does discharge such a quantity of sulphur at such a height that the fumes mixed with moisture are not dissipated,

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or diffused, or dispersed in the atmosphere, but descend on the appellant's land and damage it. Mr. Selvey suggests that it is uncommon to have so large a station near agricultural land. In view of the fact that larger stations are being erected, e.g., at Birmingham, and are likely to be erected on agricultural land, the legal incidence of this damage is of great importance. At the trial, after two witnesses had been called for the plaintiff, counsel for the Corporation admitted that what they had done would be an actionable nuisance but for the protection which he said their statute gave them. The learned judge in a very careful judgment held: (1.) that the Corporation had statutory protection for the necessary consequences of such a generating station, and (2.) that the consequences in this case could not have been avoided—in other words, that the station was not constructed and worked negligently. The plaintiff appeals.

The first point obviously requires a close consideration of the relevant statutes and orders, for it is alleged that the Manchester Corporation have been given power to damage the property of a person, who is not one of their citizens or within their area, without paying him compensation. The Courts, in construing private Acts, act on a presumption that this has not been intended unless very clear words are used. "The principle recognized as a canon of construction of statutes by many authorities" is said by Lord Atkinson in *Central Control Board (Liquor Traffic)* v. *Cannon Brewery Co.* (1) to be "that an intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the Legislature unless that intention is expressed in unequivocal terms." Cozens-Hardy M.R. expresses the position thus in the case of *Price's Patent Candle Co.* v. *London County Council* (2): "Certain general principles have been laid down for our guidance in cases of this nature. In the first place, there is a presumption that a public body, whether a trading body or not, is not authorized to create a nuisance or otherwise to affect private rights unless compensation is provided. In

(1) [1919] A. C. 744, 752. (2) [1908] 2 Ch. 526, 543, 544.

the second place, this presumption must yield where the language of the statute is sufficiently clear to authorize the nuisance without compensation. In the third place, if the statute expressly confers a power but adds a proviso that no nuisance must be created, it is no defence to say that the work, in truth, cannot be done without creating a nuisance. The smallpox hospital case (*Metropolitan Asylum District* v. *Hill* (1)), the Hammersmith Railway Company case (*Hammersmith Ry. Co.* v. *Brand* (2)), and the Birmingham sewage case (*Attorney-General* v. *Birmingham Corporation* (3)) are sufficient illustrations of these principles." In *Scottish Drainage Co.* v. *Campbell* (4) Lord Herschell says: "When an Act of this description is obtained by a company incorporated for purposes of profit, to confer upon them rights and powers which they would not have at common law, the provisions of such a statute must be somewhat jealously scrutinized, and I think that they ought not to be held to possess any right unless it be given in plain terms or arises as a necessary inference from the language used." And many similar expressions might be quoted. I approach the relevant Acts and Orders from this point of view.

The Electric Lighting Act of 1882 provided for the supply of electricity by either licences (s. 3) or Provisional Orders (s. 4), the latter being the usual method. Either was a grant "to supply electricity within any specified area." Either mode, by virtue of s. 10, empowered the undertakers to obtain such lands by agreement and construct such "works" (which include buildings, and therefore generating stations) as were necessary and incidental to such supply. At that time the power to take lands compulsorily was not granted, but by the Electric Lighting Act, 1909, s. 1, the Board of Trade could by Provisional Order authorize any local authority, company or person to acquire compulsorily, and to use for the purpose of a generating station, any land specified in the Order, within or without the area of supply. By s. 3, the power of breaking up streets "for the purpose of enabling

(1) 6 App. Cas. 193.
(2) L. R. 4 H. L. 171.
(3) 4 K. & J. 528.
(4) 14 App. Cas. 139, 142.

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electricity to be brought into an area of supply from a generating station situate outside the area of the undertakers" might be given by Provisional Order. This was necessary, because the definition of "street" in the Act of 1882 only applied to streets within the area of the undertakers. Up to 1899 it was usual to insert in Provisional Orders the "nuisance clause": "Nothing in this Order shall exonerate the undertakers from any indictment, action, or other proceedings for nuisance in the event of any nuisance being caused or permitted by them." The Manchester Order of 1890, which is the foundation of the Corporation's powers in their area of supply, has such a clause in s. 70, and it was therefore held by the Court of Appeal in *Midwood & Co.* v. *Manchester Corporation* (1) that though the Corporation were compelled by the Order to lay down distributing mains in certain streets on a system approved by the Board of Trade, and had done so without negligence, they were liable for a nuisance caused without negligence by their mains, by reason of this s. 70. A similar decision was arrived at by the Court of Appeal in *Shelfer's Case* (2), a nuisance having been caused by a generating station, where also the Provisional Order contained the nuisance clause. It is clear therefore that within their area of supply the Manchester Corporation are liable for nuisance caused without negligence in the management of their generating stations and works within their area. It is said however that outside their area they are not liable for such nuisances, because though they would be liable if they had got their powers by Provisional Order approved by Parliament, they are not liable if they obtain those powers by private Act.

The point arises in this way: As Provisional Orders and Acts became more frequent, it was thought desirable to group the usual clauses in one Act, to be incorporated in every subsequent Provisional Order or special Act unless expressly excluded in whole or part. Accordingly, in 1899 the Electric Lighting (Clauses) Act was passed. The clauses in the Schedule, of which the nuisance clause was s. 81, were "to

(1) [1905] 2 K. B. 597. (2) [1895] 1 Ch. 287.

be incorporated with and form part of" every Provisional Order after the commencement of the Act, "save so far as they are expressly varied or excepted by the Order." If therefore the powers as to this generating station had after 1909 been given by Provisional Order approved by Parliament, unless there had been express exception or variation, the nuisance clause (s. 81) would have formed part of the Order, and the plaintiff, on the authority of *Midwood's Case* (1), would have recovered. It is said that the fact that the powers are given by a special Act makes all the difference, for, though the clauses, unless expressly varied or excepted, are also to be incorporated in every special Act, "special Act" is defined as "an Act authorizing the supply of electricity . . . . within any area," and the Act of 1914 is not an Act authorizing a supply of electricity "within" an area, but at most an Act authorizing supply "to" an area. There arise two questions: (1.) Is the Act of 1914 an Act authorizing supply within an area? (2.) If so, do its provisions expressly vary or except the nuisance clause, s. 81?

The Act of 1914 by its title describes itself as an Act for conferring further powers upon the Corporation for "the supply of electricity," and they are only authorized to supply within an area. Under modern practice, the title is part of the Act, and may be looked at to help in its interpretation: per Lindley M.R. in *Fielding* v. *Morley Corporation*. (2) The preamble to the Act of 1914 recites estimates for 50,000*l*. for works "for the supply of electricity," which again must be supplied within the area. And if the meaning or object of the Act is not clear, the preamble may be resorted to, in order to explain the Act: per Buller J. in *Crespigny* v. *Wittenoom*. (3) Part V. of the Act of 1914 contains the enacting provisions as to electricity. Sect. 32 empowers the Corporation to construct and extend on the land described a generating station and works necessary or convenient to enable the Corporation to generate and "supply" electricity. Where are they to supply it? By s. 36, they may supply it

(1) [1905] 2 K. B. 597. (2) [1899] 1 Ch. 1.
(3) (1792) 4 T. R. 790, 793.

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within the areas prescribed by their Acts or Orders from the station authorized by this part of the Act, and by s. 33 they may lay electric lines outside their area to bring electricity to the city, i.e., to their prescribed area. Such an Act seems to me clearly to be an Act authorizing the supply of electricity from this generating station within the city area, and therefore to be a "special Act" within s. 1 of the Electric Lighting (Clauses) Act, 1899. I can see no intelligible reason why Parliament should make the Corporation liable for nuisance from a generating station within their area, which affects their own citizens, and free them from liability to outsiders for nuisance arising from a generating station outside their area. Nor can I see any reason why Parliament should insert by reference the nuisance clause in a Provisional Order approved by Parliament, but exclude it if the same provisions are contained in a private Act. In my opinion the Act of 1914 is a "special Act" within s. 1 of the Electric Lighting (Clauses) Act, 1899.

The second question is: Has the special Act expressly varied or excepted the operation of the scheduled clauses of the Act of 1899, especially the nuisance clause, s. 81? It certainly has not in express words varied or excluded the nuisance clause. The authorities show that a different provision in the special Act may, by direct inference, "expressly" exclude the corresponding provision in the general Act: *Attorney-General* v. *Great Eastern Ry. Co.* (1) It is said that the nuisance clause is expressly excluded in this case, because a certain number of persons by particular protective clauses (e.g., ss. 37-41) have expressly included it. I attach very little weight to protective personal bargains in a private Act, as affording material for varying general legislation. Lord Cairns said in *East London Ry. Co.* v. *Whitechurch* (2): "We all know how these clauses are inserted in an Act of Parliament of this kind. They are in the nature of private arrangements put into the Act at the instance of particular parties, who either act with greater caution than other parties, or act with a desire to make a better bargain

(1) (1872) L. R. 7 Ch. 475. (2) L. R. 7 H. L. 81, 89.

for themselves than other parties have made. They are not put in by the Legislature as part of a general scheme of legislation which it desires to express, but they are in the nature of particular contracts, and ought not to have any effect upon the construction of a general clause such as that which I have read to your Lordships."

(2.) A more important argument is based upon the provisions of s. 36, sub-s. 5, of the Act of 1914 giving power to break up streets outside their area, and incorporating some of the provisions of the Electric Lighting (Clauses) Act for that purpose, including s. 81, the nuisance clause. It was forcibly said, that if it was necessary to do this it was because the nuisance clause was not otherwise incorporated. The explanation of this sub-section appears to be that "streets" in the Act of 1882 were limited to streets inside the area of the undertakers, and it was therefore necessary to give powers as to streets outside the area. But I cannot regard the express application of the nuisance clause for purpose (*a*), as inconsistent with its application to purpose (*b*), if the general Act so applies it. And the presumption against damaging property without compensation, or in a local and personal Act without clear words authorizing it, in my view requires me to hold that there is nothing in the Act of 1914 "expressly varying or excepting" the application of the nuisance clause which the general Act provides, and the Corporation's provisional orders expressly prescribe in the case of these other works.

What then is the position if the nuisance clause is incorporated in the Act of 1914? In my opinion we are bound by the decision of this Court in *Midwood's Case* (1) to hold that the fact that a generating station on the land is authorized by Parliament, and that it is worked without negligence (if that be the case), does not, when there is a nuisance clause in the Act or Order, relieve the undertakers from paying compensation for damage done by the station amounting to a nuisance. The result may possibly be that the nuisance, being authorized, cannot or should not be stopped, but that

(1) [1905] 2 K. B. 597.

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damage done by the nuisance must be compensated for by the payment of proved damages. This appears to be the result which Parliament has provided for by s. 10 of the Electricity Supply Act, 1919, in the case of Orders authorizing generating stations made after the passing of that Act. The discretion of the Court in granting injunctions may well be influenced by this Parliamentary provision.

The plaintiff's counsel also contend that the defendants have not proved that it is necessary and incidental to a generating station properly planned and worked on this land, that it should cause the damage in this case. Lord Sumner in *Quebec Railway, Light, &c., Co.* v. *Vandry* (1) explains the position of statutory authorization thus: "The appellants, however, rely on the authority to carry their wires overhead which the statutes give, as an answer to the claim, and contend that the statutes exclude the operation of arts. 1053 and 1054 of the Code in matters concerning the distribution of high-tension electricity by overhead cables, as repugnant to the power which the Legislature has bestowed. The application of enactments of this kind is familiar and well settled. Such powers are not in themselves charters to commit torts and to damage third persons at large, but that which is necessarily incidental to the exercise of the statutory authority is held to have been authorized by implication, and therefore it is not the foundation of a cause of action in favour of strangers, since otherwise the application of the general law would defeat the purpose of the enactment. The Legislature, which could have excepted the application of the general law in express terms, must be deemed to have done so by implication in such cases. Nor need a use of the power conferred which is injurious to others be excluded from the ambit of that which is necessarily incidental to their enjoyment merely because the progress of discovery or invention reveals some extraordinary means of preventing that injury to others which has previously been unavoidable. This point arose and was settled in connection with sparks falling from locomotive engines many years ago. It therefore becomes

(1) [1920] A. C. 662, 679, 680.

necessary to consider how far such an escape of electricity as took place in this case was incidental to the use of overhead cables and how far and by what reasonable precautions injurious consequences were preventible." In this case the position is more favourable to the plaintiff, as Parliament and the Government Departments have both, in Provisional Orders and the Electric Lighting (Clauses) Act, 1899, contemplated the grant of powers of generating and supplying electricity as subject to the nuisance clause. But in considering whether the nuisance in this case is "necessarily incidental," to use Lord Sumner's words, to a generating station, or "preventible by reasonable precautions," I am much impressed by certain points in the evidence. The Corporation never seem to have considered, when this station was built, to be worked on a larger scale than had ever been done before in England, what would be the effect of so large a quantity of sulphurous fumes being given forth on that site, and at the height they proposed, on the surrounding neighbourhood. They have never since consulted any outside chemical or electrical experts as to whether, by a different construction of works or chimneys, or a restriction of the work of the station, the damage from sulphur deposits can be prevented, or at any rate mitigated. It is striking that no similar damage is known in any other case, and the Corporation are unable to explain why they alone should cause damage. If the defendants are to be in a better position if they can prove that it is the inevitable result of a generating station that it should damage adjoining agricultural land by sulphur deposits, it is for them to prove it, and they have not satisfied me that all reasonable precautions have been taken to explore the causes of, and remedies for, this damage, and adopt all reasonable precautions to prevent it.

In my view the appeal should be allowed with costs here and below up to the present time. Judgment should be entered for the plaintiff for :—

1. Damages up to the present date.
2. An injunction to restrain the defendants from committing a nuisance by their generating station and

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fumes therefrom causing damage to the plaintiff's land. The operation of the injunction to be suspended for a year to enable the defendants to adopt such measures as they are advised to terminate or mitigate the nuisance.

3. Liberty to the defendants to apply at the end of the year to the King's Bench Division further to suspend the operation of the injunction on evidence as to the result of their endeavours during the year to prevent or mitigate the nuisance.

I would further add that the case shows the necessity for Parliament and other authorities concerned giving more careful attention to the provisions for compensation for damage caused by these enormous developments of electrical power stations. Promoters should not be allowed, by abstaining from asking in express words for the exclusion of any duty to make compensation for damage done (a privilege they probably would not get if they asked for it expressly), to argue afterwards that their duty to compensate had been indirectly excluded by obscure inferences.

LAWRENCE L.J. The first question to be decided on this appeal is whether the Manchester Corporation Act, 1914, is a "special Act" within the meaning of s. 1 of the Electric Lighting (Clauses) Act, 1899. The expression "special Act" is defined in the latter Act as meaning "any Act passed after the commencement of this Act authorizing the supply of electricity for any public or private purposes within any area." The Electric Lighting Act, 1882, by s. 3, sub-ss. 3 and 4, defines "public purposes" as meaning (stated broadly) the lighting of streets, churches, public halls and theatres, and "private purposes" as including any purposes not being "public purposes" except the transmission of telegrams.

By the Electric Lighting Orders Confirmation (No. 11) Act, 1890, the Provisional Order granted by the Board of Trade under the Electric Lighting Acts, 1882 to 1888, to the Manchester Corporation in respect of the City of Manchester was confirmed. This Provisional Order (hereafter referred to as "the Order of 1890"), besides naming the Manchester

Corporation (hereinafter referred to as "the Corporation") as the undertakers thereunder, and authorizing the Corporation to supply electricity for all private and public purposes within a certain defined area, contains all the elaborate provisions relating to the supply of electricity for public and private purposes within the area of supply then usually inserted in Provisional Orders made under the Electric Lighting Acts. These provisions deal with the nature and mode of supply, the purchase of lands, the authorized and compulsory works, the compulsory supply to private consumers, the maximum prices to be charged for the supply, the appointment of inspectors, the testing and inspection of mains, the installation of meters, and many other incidental matters which it is unnecessary to specify. The Order of 1890 also contains a general provision (cl. 70) that nothing in the Order shall exonerate the undertakers from any indictment, action or other proceeding for nuisance in the event of any nuisance being caused by them.

It is to be observed that the Order of 1890, as was usual at that time, only deals in terms with the supply (within the area of supply) of electricity for public and private purposes and with works incidental to such a supply. It does not prescribe or indicate how the Corporation is to obtain its electrical energy for the purpose of the supply, whether by generating it or by buying it from other generators. This is a matter which is left to the Corporation to determine apart from the Order, though it is probable that any generating station, erected and worked by the Corporation within its area of supply, would be held to be a work incidental to the supply, and in that way might come within the scope of the authority conferred by the Order.

On August 9, 1899, the Electric Lighting (Clauses) Act, 1899, was passed for the purpose of incorporating in one Act the provisions usually contained in Provisional Orders made under the Electric Lighting Acts. By s. 1 it is enacted (inter alia) that the provisions contained in the Schedule to the Act shall be incorporated with any special Act save so far as they are expressly varied or excepted thereby, and

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the expression " special Act " is defined in the manner I have already mentioned. The provisions contained in the Schedule are similar to those contained in the Order of 1890, but there are some variations in detail to which our attention has been called. Clause 81 of the Schedule is however in the same words as cl. 70 in the Order of 1890.

In the year 1909 Parliament for the first time in a public general Act dealt specifically with matters relating to the generation of electricity as distinguished from the supply of electricity for consumption. By the Electric Lighting Act, 1909, the Board of Trade was empowered by Provisional Order to authorize any local authority or company or person, authorized by Provisional Order or Act of Parliament to supply electricity in any area, to acquire compulsorily or to use for the purpose of a generating station any land specified in the Order whether situate within or without the area of supply, and in the case of a local authority whether within or without their district. This Act contains provisions restricting the establishment of new generating stations and provisions for the purpose of enabling electricity to be brought into an area of supply from a generating station situate outside that area, for the supply of electricity in bulk and (amongst other provisions which it is unnecessary to mention) a provision for the protection of the royal palaces, parks, gardens, museums, and other public buildings empowering the Commissioners of Works to require the undertakers to carry out any necessary works for (inter alia) preventing " as far as reasonably practicable " the evolution of oxides of sulphur from any generating station. The provisions in this last mentioned section are similar in effect to those contained in ss. 17 and 18 of the London Electric Supply Act, 1908.

Prior to the passing of the Manchester Corporation Act, 1914, the Corporation, in addition to having from time to time procured enlargements of its area of supply as originally fixed by the Order of 1890, had taken over four other areas of supply, each of which was regulated by its own Provisional Order or Act of Parliament. At the date therefore when the

Act of 1914 was passed there were five areas within which the Corporation was authorized to supply electricity for public and private purposes. The Corporation also then owned and worked three generating stations, all of which were situated within one or other of its areas of supply.

The Act of 1914 is an omnibus Act, its full title being, "An Act to confer further powers upon the Lord Mayor Aldermen and Citizens of the City of Manchester with reference to street works water works tramways main drainage works and the supply of electricity and otherwise for the better local government and improvement of the city to alter the wards thereof and for other purposes." The relevant provisions of this Act, which is divided into 9 parts and contains 86 sections, are: s. 3, incorporating the Lands Clauses Acts (other than s. 127 of the Lands Clauses Consolidation Act, 1845); s. 9, conferring power for the compulsory purchase of the lands delineated on the deposited plans (which lands included the site of the generating station in question in this case); s. 13, empowering the Corporation to retain and sell any lands acquired under the Act; s. 15, conferring compulsory powers to stop up streets during the execution and for the purpose of any works authorized by the Act; and Part V., entitled "Electricity," comprising ss. 32 to 41. Sect. 32 empowers the Corporation to "erect construct maintain alter improve enlarge extend renew work and use" upon certain lands which were situated outside any of the Corporation's areas of supply and were more particularly described in sub-s. 2 of that section (power for the compulsory purchase of which was conferred upon the Corporation by s. 9, as before mentioned), a generating station with all buildings machinery and things necessary or convenient to enable the Corporation to generate and supply electricity. Sect. 33 empowers the Corporation to construct (inter alia) electric lines from the authorized generating station to the City of Manchester along the lines shown on the deposited plans. Sect. 36 empowers the Corporation: (1.) to supply the whole or any part of the Corporation's areas of supply with electrical energy from all

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or any of the generating stations of the Corporation for the time being, including those then existing and the station authorized by that Act; (2.) by means of electric mains to make connections between the then existing generating stations or areas of supply and the station authorized by that Act; (3.) by means of electric mains to make connections between any two or more areas of supply or between any such area and any generating station of the Corporation. The section also contains the following provision: "(5.) In relation to any such electric mains as aforesaid the Corporation: (A) with respect to streets in any area which they are authorized to supply shall have the powers and be subject to the provisions of the Acts and Orders relating to their powers of supply in that area. (B) with respect to streets not within any area which they are authorized to supply shall have the powers and be subject to the provisions of the Electric Lighting Act, 1882, and of ss. 10 to 20, 60 to 62, 69 to 73, 76, 77 and 79 to 82 of the Schedule to the Electric Lighting (Clauses) Act, 1899, and those provisions so far as applicable but subject to the provisions of this section shall for the purposes of this section be incorporated with this Act and shall have effect and the Corporation shall be deemed to be the undertakers."

In my judgment Talbot J. was right in his conclusion that the Act of 1914 is not a "special Act" within the meaning of s. 1 of the Act of 1899.

The main purport and effect of the Act of 1914, so far as it relates to the subject-matter of this action, is to empower the Corporation first to acquire compulsorily a site outside the Corporation's area of supply for the purposes of a generating station; secondly, to erect and work a generating station on that site; thirdly, to construct and maintain the necessary mains to enable the electricity generated at that station to be brought into the Corporation's areas of supply; and fourthly, to construct and maintain the necessary mains to give effect to the Corporation's scheme of inter-connection between its several generating stations and between its five areas of supply. The construction of the mains so authorized

necessarily involved the breaking up of streets and the execution of other street works, both within and without the Corporation's areas of supply, and the power to execute such street works was conferred on the Corporation: (*a*) as to streets within any area of supply by making the powers relating to the execution of street works, which the Corporation already possessed within that area under its Provisional Order or Act of Parliament relating to such area, apply to the construction of such of the newly authorized mains as would be situate within such area, and (*b*) as to the streets not within any of the Corporation's areas of supply by making the relevant provisions relating to the execution of street works contained in the Schedule to the Act of 1899 apply to the construction of such of the newly authorized mains as would not be situate within any such area of supply. The adoption of this method of conferring the necessary street works powers upon the Corporation ensured that the powers of the Corporation in respect of the construction and maintenance of such of the newly authorized mains as would be situate within an area of supply should be identical with the powers already possessed by the Corporation with regard to its other mains and lines within that area, and thus avoided any confusion or overlapping, and further ensured that the powers of the Corporation in respect of the construction and maintenance of such of the newly authorized mains as would not be within any area of supply would be regulated by a uniform code to be found in the relevant provisions of the Schedule to the Act of 1899. Assuming that the Provisional Orders and Acts of Parliament regulating the supply of electricity for public and private purposes within the Corporation's four subsequently acquired areas of supply contain a provision similar to that contained in cl. 70 of the Order of 1890, it is clear that the Corporation is not exonerated from an action for nuisance in the event of a nuisance being caused or permitted by it in respect of the execution or maintenance of any street works authorized by the Act of 1914 whether within or without any of its areas of supply. This result however is, in my opinion, only brought about

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by the express incorporation of the relevant provisions in that behalf in respect of such street works. Having regard to the main purport and effect of the relevant provisions of the Act of 1914, as above stated, I am of opinion that that Act is not an Act authorizing the Corporation to supply electricity for public or private purposes within any area within the meaning of s. 1 of the Act of 1899. Not only did the Corporation already possess ample authority for such a supply in every one of its areas—a fact recognized and referred to in s. 36, sub-s. 5 (A), of the Act of 1914—but the electrical energy transmitted from the generating station to the various transforming and distributing and other generating stations within the Corporation's areas of supply would be at such an extra high pressure (in fact at present 33,000 volts), as to render it wholly unsuitable for public or private purposes as defined by the Act of 1882 until after it had been transformed. Moreover, many of the clauses in the Schedule to the Act of 1899 (in particular clauses 21 to 59, which deal with the compulsory laying down of distributing mains, the compulsory supply of electricity to private consumers, the prices authorized to be charged to ordinary consumers, the testing and inspection of mains and the provision of meters) can have no possible application to the extra high pressure mains contemplated and authorized under the Act of 1914, whether within or without the area of supply. Further, clauses 2 and 4 of the Schedule to the Act of 1899 apparently contemplate that every special Act should name the undertakers for the purposes of such special Act, and should also name the area of supply for that purpose. It is to be observed that the Act of 1914 does not name any undertakers for the purpose of the Act generally, but only for the purposes of the street works dealt with in s. 36, sub-s. 5 (B), nor does it name the area of supply for the purposes of the Act, but on the contrary refers to the Corporation's areas of supply as "areas for the supply of electricity by the Corporation under the Manchester Electric Lighting Order, 1890, and any subsequent Acts and Orders": see s. 36, sub-s. 1.

The express incorporation by s. 36, sub-s. 5 (B), of part only of the Schedule to the Act of 1899 also shows that the Legislature did not consider the Act to be a special Act within s. 1 of the Act of 1899. It would lead to a strange result if the Act of 1914 were held to be a special Act and were to operate so as to super-impose upon the Corporation a fresh set of provisions conferring powers and imposing obligations in respect of the supply of electricity for public and private purposes in all its areas of supply within which areas they are already authorized and empowered by elaborate provisions of a similar nature, contained in various Provisional Orders and Acts of Parliament, to supply electricity for such purposes, and that without in any way purporting to abrogate, vary or amend any of such existing provisions. Such a result would inevitably lead to confusion, and I do not think that it has been brought about merely because Parliament has authorized the Corporation to establish and work a generating station outside such areas and to bring the electricity generated at such station into such areas.

Some stress has been laid on the fact that if Parts II. and V. of the Act of 1914 had been embodied in a Provisional Order made by the Board of Trade under the Electric Lighting Acts instead of in an Act of Parliament, such Provisional Order would have been a "special Order" under s. 1 of the Act of 1899, and consequently the Schedule to that Act would have been incorporated with it. In my opinion the plain answer to this contention is, in the first place, that s. 1 of the Act of 1899 enacts that the provisions in the Schedule shall be incorporated with every Provisional Order made by the Board of Trade under the Electric Lighting Acts, whereas in the case of an Act of Parliament the provisions are not to be incorporated with every special Act relating to electricity, but only with a special Act which answers the description of "an Act authorizing the supply of electricity for any public or private purposes within any area"; and, in the second place, that no Provisional Order has in fact been made, and it is therefore a matter of pure speculation what provisions might or might not have been

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inserted in such an Order had it been made. The Corporation may have realized the difficulty of getting the Board of Trade to accept the responsibility of dispensing with cl. 81, and for that very reason have sought Parliamentary sanction to the acquisition of the particular site and to the erection and user of its generating station on that site.

The next question to be considered is whether, assuming that I am right in concluding that the provisions in the Schedule to the Act of 1899 are not incorporated with the Act of 1914, the appellant is entitled to relief in respect of the nuisance which the Corporation is committing. It is common ground that there is no statutory provision under which the appellant can claim compensation for the damage he has sustained, and will hereafter sustain, by reason of the nuisance. If therefore the powers conferred by the Act of 1914 do not exonerate the Corporation from actions or other proceedings in respect of the nuisance, the appellant, as well as every other person suffering substantial damage from such nuisance, is entitled to an injunction which (in the circumstances proved to exist) would compel the Corporation to close down its generating station. On the other hand if the powers so conferred do exonerate the Corporation from such actions and proceedings, neither the appellant nor any other person injuriously affected will have any means of redress. It cannot be denied that the issue thus raised is grave and of much concern to both parties.

It is well settled that an intention to take away the private rights of individuals without compensation will not be imputed to the Legislature, and that the burden lies upon those who seek to establish that the Legislature had such an intention, to show that the intention appears by express words or by necessary implication: see *Truman's* case. (1) The Legislature has very frequently invested public bodies and public undertakings with powers, the exercise of which, although interfering with the private rights of individuals, are of advantage to the general public. In such cases the

(1) 11 App. Cas. 45.

Legislature usually, but by no means universally, makes provision for compensation to those injured, and the absence of any such provision affords a reason, but not a conclusive one, for thinking that the Legislature did not intend to authorize any interference with private rights. The real question in all cases of this kind, however, is whether, on a sound construction of the particular statute in question, the Legislature has or has not expressed an intention that the thing complained of may be done notwithstanding that it injures others. Lord Blackburn, in *Truman's* case (1), states: "I do not think there can be any doubt that if on the true construction of a statute it appears to be the intention of the Legislature that powers should be exercised, the proper exercise of which may occasion a nuisance to the owners of neighbouring land, and that this should be free from liability to an action for damages, or an injunction to prevent the continued proper exercise of these powers, effect must be given to the intention of the Legislature. No doubt when compensation is not given to those interested in the neighbouring land, this is, as against them, harsh legislation." The authorities show that there is a broad distinction in principle between that class of legislation which contains no element of compulsion and no indication of an intention to interfere with private rights, and that class of legislation which does contain such an element or indication.

As examples of cases where the legislation was held to fall within the first class I may mention *Metropolitan Asylum District* v. *Hill* (2) and *Canadian Pacific Ry. Co.* v. *Parke* (3), in both of which it was held that the powers conferred by the statute were of a purely permissive character and only authorized the doing of the thing, provided it could be done without interfering with the private rights of individuals.

As examples of cases in which the legislation was held to fall within the second class, I may refer to the railway cases, such as *Brand's* case (4) and *Truman's* case (5), in both of

(1) 11 App. Cas. 60.
(2) 6 App. Cas. 193.
(3) [1899] A. C. 535.
(4) L. R. 4 H. L. 171.
(5) 11 App. Cas. 45.

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which it was held that the statute contained an element of compulsion and an indication of an intention to interfere with private rights. In the case of this second class of legislation, however, it is well settled that if the interference with the private rights can be avoided by a reasonable exercise of the statutory powers, it is actionable negligence on the part of the undertakers not to make such a reasonable exercise. Lord Blackburn in *Geddis'* case (1) states: "For I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the Legislature has authorized, if it be done without negligence, although it does occasion damage to any one; but an action does lie for doing that which the Legislature has authorized, if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, 'negligence' not to make such reasonable exercise of their powers."

The question in the present case therefore resolves itself into whether the Act of 1914 falls within the first or within the second of these two classes of legislation, and, if it falls within the second class, whether the Corporation could have prevented, or can in future prevent, the nuisance complained of by a reasonable exercise of its powers. The question within which class of legislation the Act of 1914 falls presents a problem the solution of which I have found by no means easy, but after giving the matter careful consideration, and with every desire to find that the appellant is not without some remedy, I have reluctantly come to the conclusion that Talbot J. was right in treating the Act of 1914 as falling within the second class of legislation. I have searched in vain for a case in which the Court has granted an injunction or awarded damages against a public body which has onerous statutory public duties to perform—such as the Corporation's duties under its Acts and Orders in regard to the supply of electricity for public and private purposes in a populous district—and which, for the better performance of such duties, has obtained

(1) 3 App. Cas. 430, 455.

parliamentary powers to acquire a given site compulsorily and to carry on a given undertaking on that site, unless such a body has exceeded its statutory powers or has exercised them negligently or improperly.

The Railway Acts admittedly fall under the second class of legislation, and I have been unable to satisfy myself that there is any sound ground upon which the relevant provisions in the Act of 1914 can be distinguished in principle from the relevant provisions in the Railway Acts. It is true that in the case of railway undertakings the provisions of ss. 6 and 16 of the Railways Clauses Consolidation Act, 1845, apply, whereas these provisions have no application to the Corporation's undertaking in the present case. The purport and effect of these two sections, so far as material to the present question, however, is that railway undertakers are bound to make compensation to persons injuriously affected by the construction of the authorized works according to the provisions of s. 68 of the Lands Clauses Consolidation Act, 1845. It is settled beyond dispute that although it is not necessary, in order to entitle a person under the last mentioned section to compensation for injuriously affecting his land, that any part of his land should have been actually taken, yet no compensation can be recovered for damage arising from the working of the railway after the construction of the works is complete where no land of the person injured is taken: see *Brand's* case (1) and *Truman's* case. (2) The underlying principle, as I understand it, of the decisions in the railway cases and all other cases falling within the same class, is that, as the Legislature has given compulsory powers to the undertakers to take specified lands for the express purpose of using them for the particular undertaking, and that, as it has authorized the undertakers to carry on their undertaking upon the lands so taken, and has only subjected them to an obligation to make the limited compensation provided for by s. 68 of the Lands Clauses Consolidation Act, 1845, no person who does not come under that section has any remedy (either by way of injunction or for damages)

(1) L. R. 4 H. L. 171. (2) 11 App. Cas. 45.

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against the undertakers for damage occasioned by the carrying on of their authorized undertaking without negligence; were it otherwise every person injuriously affected by the carrying on of the undertaking could render the statutory powers conferred on the undertakers nugatory.

This principle appears to me to apply with equal force to a statutory undertaking such as the generating station in the present case. The Act of 1914 gives compulsory powers to the Corporation to take certain specified lands for the express purpose of using them for a generating station which the Act authorizes them to erect and work on such lands, and the Act expressly incorporates the Lands Clauses Consolidation Act, 1845, including s. 68. It is true that the Act of 1914 does not contain provisions similar to ss. 6 and 16 of the Railways Clauses Consolidation Act, 1845, but that fact is, in my opinion, merely a distinction without a difference, because it has been settled long ago that the mere incorporation of the Lands Clauses Consolidation Act, 1845, with the special Act has the effect of rendering the undertakers liable to make compensation in accordance with the provisions of s. 68, and it is not necessary to have any such direction in the special Act, as it is found in ss. 6 and 16 of the Railways Clauses Consolidation Act, 1845: see Browne & Theobald on Railways, 4th ed., p. 178, and cases there cited. The effect therefore of the incorporation of the Lands Clauses Consolidation Act, 1845, with the Act of 1914 is to place the Corporation in precisely the same position as the railway undertakers in *Brand's* case (1) and in *Truman's* case (2), with only one exception—namely, that s. 127 of the Lands Clauses Consolidation Act, 1845 (which would hardly be applicable to a site such as the one in the present case) is excepted from the Act of 1914 and the Corporation is, by s. 13 of that Act, authorized to retain the whole of the site of the generating station, and is not obliged to sell any part of it as superfluous land. This exception however does not, in my opinion, make any substantial distinction between the railway cases and this case. In both cases the undertakers

(1) L. R. 4 H. L. 171. (2) 11 App. Cas. 45.

are given power to expropriate private individuals for the purposes of their undertaking, and to carry on that undertaking on the lands thus acquired, although it may injuriously affect the neighbouring lands not only of the persons whose lands are taken but also of others whose lands are not taken, and in both cases the only compensation provided by the Legislature is that which is recoverable under s. 68 of the Lands Clauses Consolidation Act, 1845. The elements of compulsion and the indications of an intention to interfere with the private rights of individuals in the Act of 1914 are, in my opinion, precisely similar in kind and degree to those contained in the Railway Acts. In one respect the present case is even stronger than *Truman's* case (1) in that the Act of 1914 confers upon the Corporation power to purchase compulsorily the particular site for the very purpose of erecting and working a generating station, whereas in *Truman's* case (1) there was no express authority to use the particular site there in question as a cattle yard.

As to the nature of the undertaking authorized to be carried on by the Act of 1914, it has to be borne in mind that the Legislature, in 1914, was fully alive to the fact that sulphur compounds would be emitted from the chimneys of a generating station, and that the evolution of such sulphur compounds might have a deleterious effect; this appears plainly from the provisions of s. 18 of the London Act of 1908 and of s. 22 of the general Act of 1909, to which I have already referred. If in a case like the present undertakers were held liable to be restrained from carrying on their undertaking notwithstanding that they have acted in strict conformity with their statutory powers and without negligence, it would mean that every person now, or at any time hereafter, injuriously affected by the proper exercise of such powers could, if he were so minded, abrogate the statute and render it useless. In the result I have come to the conclusion that the Act of 1914 falls within that class of legislation which, in *Truman's* case (1) and in *Parke's* case (2),

(1) 11 App. Cas. 45. (2) [1899] A. C. 535.

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has been termed "imperative" as distinguished from the class of legislation which is merely permissive, and that, on the true construction of the Act of 1914, the Legislature has expressed an intention that the generating station may be carried on notwithstanding that it injures others, provided that the injury cannot, by the adoption of any reasonable means, be avoided. Having reached this conclusion I think it is the duty of the Court to give effect to the intention of the Legislature, although it may seem harsh legislation as against the plaintiff.

There remains the question whether the Corporation could, by a reasonable exercise of its statutory or other powers, have avoided the nuisance complained of; in other words, has the Corporation done all that is reasonably practicable to prevent the nuisance? That is a pure question of fact. The learned judge, after a careful and exhaustive hearing, has found that the generating station has been both constructed and worked with all the skill which, so far as science has gone, is available, and that the Corporation has tried in good faith to find some remedy for the nuisance, but in vain. The learned judge expressly finds that the Corporation has shown, as far as such a thing can be shown, that there are no means, which science and knowledge as they exist now can suggest, by which the nuisance, which admittedly is occasioned solely by the emission of sulphur compounds from the chimneys of the generating station, can be avoided. The appellant challenges these findings of fact, and asks this Court to find that the Corporation has been unreasonable or negligent in the exercise of its statutory powers in the following respects: First in erecting a generating station which not only was much larger than was obligatory but also was of an unsuitable design: Secondly in not further heightening the chimneys or in not now regrouping them and lessening their number: Thirdly in not causing the sulphur compounds to leave the chimneys at a greater speed so as to cause them to ascend higher into the air after their emergence from the chimney exits: and Fourthly in not obtaining sufficient expert advice as to how to avoid the nuisance.

I have carefully studied the evidence on these points, and am of opinion that the learned judge was right in the conclusions which he reached upon all of them. Mr. Singleton stated that he made no complaint about the quality of the coal used by the Corporation at the generating station. The coal so used was proved to contain 2·2 per cent. of sulphur, causing when burnt the admittedly unavoidable evolution of the corresponding quantity of oxides of sulphur. The chief complaint insisted upon in this Court was as to the size and general design of the generating station, especially as regards the number and height of the chimneys and of their close proximity to one another. The Act of 1914 places no limit on the size of the generating station except such as may be inferred from the extent of the site, and it is to be observed that express power is given to the Corporation to extend and enlarge any generating station established on that site. It is true that the Corporation might have exercised its powers by erecting a much smaller station, but the Act confers ample power to erect a station of the size actually erected, and no evidence was adduced to show that the station was larger than was needed by the Corporation, or than was contemplated when the Act of 1914 was passed. Moreover, Mr. Tyldesley Jones stated, and Mr. Singleton did not deny, that the consent of the Electricity Commissioners to the erection of this particular generating station was duly obtained by the Corporation under s. 11 of the Electricity (Supply) Act, 1919, and that in accordance with the procedure laid down by such Commissioners the Corporation, before obtaining such consent, was obliged to and did in fact submit a plan and elevation of the generating station and a description of the machinery to be installed therein to such Commissioners. I agree with the learned judge that the evidence plainly establishes that the generating station as actually erected was a model of what such a station should be. In the face of these facts it is, in my opinion, impossible for this Court to hold that the Corporation was not exercising its statutory powers reasonably or properly because the size of the station was too large or because the design, including the number,

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height and position of the chimneys, was unsuitable. As to the allegation that the Corporation ought to further heighten the chimneys, or ought now to regroup them and lessen their number, the evidence in my opinion establishes that neither heightening nor rearranging the grouping of the chimneys would mitigate the nuisance to any appreciable extent, and that to adopt either of these methods would practically involve the reconstruction of the generating station. In these circumstances I am of opinion that the Corporation cannot properly be held guilty of negligence in maintaining the structure of the generating station in its present condition. The suggestion that the sulphur compounds ought to be expelled with greater force from the chimneys is, in my opinion, completely answered by the evidence that the adoption of such a course would involve the burning of more coal, with the consequent emission of more sulphur compounds, and moreover, even if sending such fumes slightly higher into the air would cause any diminution of the nuisance, which is denied, such a course would, as the sulphur fumes are of such a light character, be quite useless whenever there was the least breath of wind. In my judgment, in view of the evidence no unreasonable or negligent conduct ought to be imputed to the Corporation for not adopting the course suggested.

The last head of complaint is that the Corporation has not obtained sufficient expert advice on the question of abating the nuisance. The Corporation has been advised by Mr. Harry Cornwall Lamb, a member of the Institute of Electrical Engineers, who in August, 1925, succeeded Mr. Pearce as chief engineer and manager of the Corporation's Electricity Department. Mr. Lamb has been in the service of the Corporation since 1902, and the Corporation has therefore had ample opportunity of judging of his capabilities. No evidence has been given nor suggestion made that he is not a thoroughly competent electrical engineer. At the trial Mr. Taite, the chief engineer and manager of the Lancashire Electric Power Company, Mr. Selvey, an eminent consulting electrical engineer, and Mr. Baylin, a mechanical engineer

and an expert in the design, manufacture and equipment of plant in connection with steam generation, who I gather was responsible for the installation of the machinery at the generating station, were called as witnesses on behalf of the Corporation, and the result of their evidence is that none of the suggestions made on the appellant's behalf would appreciably diminish the nuisance, and that they themselves cannot suggest anything that the Corporation could have done, or could now do, to effect any such diminution. It appears therefore that the reliance which the Corporation placed on their chief engineer was not misplaced, and that either the climatic conditions or the configuration of the ground, or both combined, are the probable causes of the mischief, and that it is not occasioned by any negligent exercise by the Corporation of its statutory powers. In fact the evidence has convinced me, as it did the learned judge, that the nuisance complained of is the inevitable and necessary consequence of carrying on the generating station on this site. In these circumstances I am of opinion that the Corporation ought not to be held guilty of negligence in not obtaining independent expert advice at an earlier stage. In the result for the reasons stated I am of opinion that the decision of the learned judge on the whole case was right, and that this appeal ought to be dismissed.

Before parting with the case however I desire to mention two further points which were taken on behalf of the respondents, lest it should be thought that I had overlooked them. The first is that, even if the Act of 1914 be a special Act, cl. 81 of the Schedule to the Act of 1899 is "expressly excepted thereby" within the meaning of s. 1 of the latter Act. This contention is based mainly on the express incorporation of cl. 81 contained in s. 36, sub-s. 5 (B), of the special Act, which deals only with street works outside the Corporation's area of supply. It is said that the natural implication of such a limited incorporation is that cl. 81 is excepted from the rest of the provisions in the Act, and reliance is placed on the decision in *Chorlton* v. *Lings* (1) (followed by

(1) (1868) L. R. 4 C. P. 374, 387, 393.

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Russell J. in *Attorney-General* v. *Liverpool Corporation* (1)), that the word "expressly" does not necessarily denote "expressed in words," but often means no more than "plainly," "clearly" or the like, and that whatever the language necessarily or even naturally implies is expressed thereby. The contention based on these cases commends itself to my mind, but as in my judgment the point does not arise for decision I prefer not to express a final opinion upon it.

The second point is that, even if the Act of 1914 be a special Act within s. 1 of the Act of 1899, and even if the whole of the Schedule to the latter be incorporated with the former, yet the Corporation is not liable for the nuisance, as such nuisance is an inevitable consequence of working the generating station on the specified site, and therefore the express and definite authority to work the generating station on that site would override the general provisions of cl. 81, and the Corporation would, notwithstanding that clause, be exonerated from an action for nuisance. I entertain grave doubt whether this contention is well founded, or whether the better view is not that the effect of the incorporation of cl. 81 would be to make the authority conferred on the Corporation merely a conditional authority dependent upon the Corporation being able to work the generating station on the specified site, so as not to cause a nuisance, in which latter case the fact that the Corporation had taken all reasonable and practicable precautions to avoid nuisance would afford no answer to the appellant's claim : see *Midwood's Case*. (2) But here again, for the reasons stated, I prefer to express no final opinion.

SANKEY L.J. In this case the plaintiff claimed an injunction and damages on the ground that the defendants were committing a nuisance by the emission of poisonous and noxious fumes from the chimneys of their generating station, which damage his farm and cattle. The learned judge gave judgment for the defendants, and from that the present appeal is brought.

(1) [1922] 1 Ch. 211. (2) [1905] 2 K. B. 597, 606.

The facts are as follows: As far back as 1890 the defendants obtained a Provisional Order entitling them to supply electricity in a certain area. In 1914 they were minded to supply electricity for power purposes on a much larger scale, and obtained a private Act, the Manchester Corporation Act, 1914 (hereinafter referred to as "the Manchester Act"), authorizing them to erect a generating station at a place called Davyhulme, about eight miles from Manchester, on a particular spot, with power to lay electric mains from that spot into their area. The war prevented them starting, but at its conclusion they took advantage of their powers and erected a station which at the time it was built was the largest in England. It is an extensive building, with ten tall chimneys. The consumption of coal is between 500 and 600 tons a day. Unfortunately, the coal, which the learned judge found it was not unreasonable to use, has a sulphur content of about 2 per cent., and emits sulphurous fumes. This appears to be not an uncommon thing, and one of the London Electric Supply Acts, 1908, s. 18, expressly provides for such a contingency, as may also s. 10 of the Electricity Supply Act, 1919, which provides that where undertakers are authorized by Order made after the passing of that Act to acquire or use any land for the purpose of a generating station, no person shall be entitled to restrain the use of the land for that purpose. Possibly the section meant to confine a person injured to his remedy for damages only.

The fumes coming from the chimneys settle down upon the plaintiff's land, and admittedly cause a nuisance and considerable damage. Apparently this is the only generating station where such considerable damage does occur. It is due to the effect of the oxides of sulphur which cause persons who inhale them to cough and splutter and are destructive of vegetation and deleterious to cattle. Various reasons were assigned for this exceptional result. It was suggested that the configuration of the land prevented the fumes from being carried away, or that the construction of the building was responsible, or the climatic conditions caused by the damp air of Lancashire acting on the sulphur oxides. The

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defendants tried to prevent the nuisance by slightly increasing the height of the chimneys, but to no purpose.

The plaintiff thereupon brought the present action. He took two points: (1.) By reason of s. 1 of the Electric Lighting (Clauses) Act, 1899, the provisions in the sections of that Act are incorporated with the Manchester Act, and by s. 81 of the Schedule it is provided that nothing in the special Act shall exonerate the undertakers—that is, the defendants—from proceedings for nuisance in the event of any nuisance being caused or permitted by them. The plaintiff says: "You, the defendants, admit that you have committed a nuisance and therefore I am entitled to an injunction and damages." (2.) He says: "Even if the Electric Lighting (Clauses) Act, 1899, does not apply, and there is no nuisance clause incorporated in the Manchester Act, you, the defendants, are still liable, because you are not carrying on your generating station in the best way; you are carrying it on negligently, and if you were not doing that there would be no nuisance and no consequent damage." This second point is one of fact, and witnesses were called on both sides with regard to it. In my view, the onus of showing that the generating station was not being negligently carried on lay upon the defendants, because, nuisance being admitted, it was for them to show that they were authorized to carry on the generating station, and that they were doing so in a way that was not negligent.

The defendants' answer was as to (1.) The Electric Lighting (Clauses) Act, 1899, does not apply, and there is no nuisance clause incorporated in the Manchester Act. (2.) They join issue.

I now deal with the points in order: (1.) Is the Manchester Act a "special Act" within the meaning of the Electric Lighting (Clauses) Act, 1899, so as to incorporate the damage section, s. 81, of that Act? The answer advanced by the defendants to substantiate their answer is of a very technical character. They admit that if they are right their position is probably due to a happy accident in legislation, for if they had proceeded by Provisional Order instead of by Private Act,

the nuisance clause would probably have been incorporated. I think this is so by reason of the decision of the Court of Appeal on the Provisional Order of 1890, in the case of *Midwood* v. *Manchester Corporation*. (1) The defendants argued as follows: The words "special Act" in s. 1 of the 1899 Act do not occur alone. "Special Act" is defined as meaning any Act passed after the commencement of that Act authorizing the supply of electricity for any public or private purpose within any area. They say that the Manchester Act is not an Act authorizing a supply of electricity within any area. It is argued on their behalf that those words, when you consider the history of the legislation, have acquired a technical meaning, and do not mean or include an Act such as the Manchester Act, which authorizes the erection of a generating station, but mean and include an Act under which a company is authorized to supply electricity in bulk to a person or point by whom or from which it is then distributed and supplied to persons within an area. We were referred to certain Private Acts—the Chelsea and Central Electric Supply Acts and St. James Act of 1899, and the Somersetshire Act—which it was claimed substantiated this distinction.

The history of the legislation is somewhat intricate. The Electric Lighting Act, 1882, by s. 10, authorizes the undertakers to supply electricity and to obtain land for generating stations by agreement. That was the position up to 1898, when a joint committee under Lord Cross advised that power should be given to local authorities to acquire land for generating stations, but with a further recommendation that the undertakers should not be exposed to any further liability for nuisance than that which Lord Blackburn in *Geddis* v. *Bann Reservoir Proprietors* (2) stated is imposed by the common law in the case of persons exercising statutory powers and duties. Since the date of that report a large number of undertakers have obtained special statutory powers authorizing them to construct and work generating stations on specified land and either excluding s. 81 of the 1899 Act from being incorporated or providing that it should

(1) [1905] 2 K. B. 597. (2) 3 App. Cas. 430, 455.

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not apply to the generating station authorized. This history is correctly stated at pp. 78 and 176 of the 5th edition of Wills on Electric Lighting, and it was contended by the defendants that the result was that undertakers are only liable in respect of such stations to proceedings for nuisance in the event of negligence being proved against them, and that the plaintiff was wrong in saying that the effect of s. 1 of the Electric Lighting (Clauses) Act, 1899, was to incorporate the nuisance clause in the Manchester Act. The plaintiff relied upon such familiar cases as *Scales* v. *Pickering* (1); *Parker* v. *Great Western Ry. Co.* (2); and *Webb* v. *Manchester and Leeds Ry. Co.* (3), which lay down the principle that Acts of Parliament of this character ought to be jealously scrutinized and ought not to be held to confer any right unless it be given as a necessary inference from the language used; and reminded us of the rule of construction not to allow private property to be confiscated or damaged unless an Act of Parliament in express terms authorizes such a result. In *Parker* v. *Great Western Ry. Co.* (4) Tindal C.J. says: "It is to be observed, that the language of these Acts of Parliament is to be treated as the language of the promoters of them: they ask the Legislature to confer great privileges upon them, and profess to give the public certain advantages in return. Acts passed under such circumstances should be construed strictly against the parties obtaining them, but liberally in favour of the public." Again, in *Weir River Commissioners* v. *Adamson* (5) Lord Blackburn says: "The first inquiry for your Lordships is, are we justified in putting a different construction on the words of an Act passed at the instance of particular promoters (or, as it is commonly called, an Act local, personal and public) from that which would be put on similar words in a general Act. To some extent I think we are."

It is not without great doubt and difficulty that I have reached the conclusion that the construction contended for

(1) (1828) 4 Bing. 448.
(2) (1844) 7 Scott, N. R. 835.
(3) (1839) 4 My. & Cr. 116.
(4) 7 Scott, N. R. 870.
(5) (1877) 2 App. Cas. 743, 766.

by the defendants is the correct one. I think if the last three words of s. 1 of the 1899 Act, the words "within an area," had been omitted, the plaintiff would have been right, but those words qualify the words authorizing the supply of electricity, and the whole of the words read together do not apply to an Act such as the Manchester one authorizing the construction of a generating station. It is not as if the words defining "special Act" had been "Any Act relating to or dealing with electricity." The words are "Any Act authorizing the supply of electricity within any area." The definition words are specific, and not general. I reach the same conclusion as the learned judge—namely, that the Manchester Act is not an Act authorizing the supply of electricity for any public or private purpose within any area, within the meaning of s. 1 of the 1899 Act. The object of the Manchester Act was to authorize the Corporation, on a particular site, to build, work, and use a station for the generating of electricity, and a nuisance clause is not incorporated in it. Two other minor points lead to and support this conclusion: (1.) If the Electric Lighting (Clauses) Act, 1899, is incorporated, it will be found that some of its regulations conflict with the regulations contained in the Manchester Provisional Order of 1890, which may lead to an inconvenient and embarrassing result. (2.) There is some force in the argument that by s. 36 of the Manchester Act the Electric Lighting (Clauses) Act, especially the nuisance section, s. 81, is incorporated for some purposes, and this shows that it is not incorporated for all purposes. It is incorporated, as it is pointed out, for the purpose of electric mains, and not for any purpose applying to the erection or working of a generating station. It might be argued in opposition to this view that cl. 36 (5.) (*b*) is an exception on an exception, but on the whole both these minor points seem to me to give some support to the conclusion I have arrived at as a consequence of the main argument.

I now deal with the second point—that is, that even if the Electric Lighting (Clauses) Act does not apply, and there is no nuisance clause incorporated in the Manchester Act, the

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defendants are still liable, because they are not carrying on their generating station in the best and most approved way. The law applicable to cases where Parliament has authorized the erection and continuance of undertakings such as railways, hospitals, electricity stations, and so forth, has proceeded on two broad lines, both of which are now well understood, and are perhaps best distinguished in the judgment of Lord Halsbury in *London, Brighton and South Coast Ry. Co.* v. *Truman* (1), where he says: "The Railway Acts, treated as a well known and recognized class of legislation, were expressly and carefully distinguished from the permissive character of the legislation which your Lordships were then construing. Broadly stated, the distinction taken amounted to this, that a small-pox hospital might be built and maintained if it could be done without creating a nuisance, whereas the Railway Acts were assumed to establish the proposition that the railway might be made and used whether a nuisance were created or not." In *Metropolitan Asylum District* v. *Hill* (2) Lord Watson says: "I do not think that the Legislature can be held to have sanctioned that which is a nuisance at common law, except in the case where it has authorized a certain use of a specific building in a specified position, which cannot be so used without occasioning nuisance, or in the case where the particular plan or locality not being prescribed, it has imperatively directed that a building shall be provided within a certain area and so used, it being an obvious or established fact that nuisance must be the result." This must be supplemented by referring to *Geddis* v. *Bann Reservoir Proprietors* (3), where Lord Blackburn says: "It is now thoroughly well established that no action will lie for doing that which the Legislature has authorized, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorized if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common

(1) 11 App. Cas. 45, 53. (2) 6 App. Cas. 193, 212.
(3) 3 App. Cas. 430, 455.

law, the damage could be prevented it is, within this rule, 'negligence' not to make such reasonable exercise of their powers."

The question to be determined on the second point therefore is: Have the defendants shown that an inevitable result of a reasonable exercise of their powers in carrying on the generating station, which they were authorized to erect at the spot in question, was to create a nuisance? On this I am greatly pressed by several considerations: (1.) That although there are other generating stations up and down the country, this is the only station where such results occur. (2.) That no explanation is given why they do occur. (3.) That beyond raising the chimneys to some small extent the defendants have done nothing to try and remedy the nuisance. (4.) That the defendants apparently never took any independent advice as to whether it was possible to mitigate or terminate the nuisance; indeed the experts whom they called at the trial had only been consulted apparently a short time before the hearing. (5.) That although the station may be a perfect one for generating electricity, it does not follow that it is a perfect one to deal with the emission of noxious fumes from its chimneys.

In the result I am not satisfied that the defendants have proved that they have carried on and worked the generating station without negligence, and on that ground the plaintiff in my view is entitled to damages, and also to an injunction in a modified form restraining the defendants from continuing to work the station unless and until they have taken all reasonable steps to terminate or mitigate the nuisance, and I think the operation of the injunction should be suspended for a period of twelve months. I agree with the order proposed by Scrutton L.J.

Appeal allowed.

Solicitors for appellant: *Ellis & Fairbairn.*

Solicitors for respondents: *Sharpe, Pritchard & Co., for P. M. Heath, Manchester.*

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BARROW, LANE AND BALLARD, LIMITED *v.* PHILLIP PHILLIPS AND COMPANY, LIMITED.

[1928. B. 2086.]

Sale of Goods—Parcel of specific Goods at Wharf—Sale of Parcel—Part of Parcel fraudulently abstracted by third Party before Date of Contract—Validity of Contract—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 6; *s.* 30.

Sect. 6 of the Sale of Goods Act, 1893, provides: "Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void":—

Held, that the section applies where part only of the goods have perished at the time when the contract is made.

ACTION tried by Wright J. without a jury.

By a contract in writing dated October 7, 1927, Messrs. Barrow, Lane & Ballard, Ld. (hereinafter called "the plaintiffs"), bought from the sellers thereof "E. C. P. Lot 7. 700 bags (about 25 tons) Chinese ground nuts in shell (about equal to sample) at 26*l.* 5*s.* (twenty-six Pounds five shillings) per ton, ex store London. Lying at National Wharves. Gross landing weights. . . . . Customary allowances and conditions. Prompt 4th July, 1927. Rent free to 4th Nov., 1927. Net cash against delivery order."

By an oral contract made on October 11, 1927, the plaintiffs sold to Messrs. Phillip Phillips & Co., Ld. (hereinafter called "the defendants"), "700 bags marked E. C. P. and known as Lot 7 of Chinese ground nuts in shell then lying at the National Wharves in London at the price of 28*l.* per ton to be computed by reference to the gross landing weights previously ascertained when the goods were landed and placed in store at the said wharves." That contract was made verbally between Mr. G. Lane for the plaintiffs and Mr. Brinkley for the defendants. The price was computed on the gross landing weights and amounted to 727*l.* 18*s.* 3*d.* In respect of that price and of a further sum of 78*l.* 4*s.* otherwise due from them to the plaintiffs, the defendants accepted two bills of exchange for 500*l.* and 306*l.* 2*s.* 3*d.* respectively, each dated October 11,

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1927, drawn by and payable to the order of the plaintiffs. On October 12, 1927, the defendants handed to the plaintiffs these bills of exchange in return for a delivery order upon the National Wharves and Warehousing Company, Ld. (hereinafter called "the company"), the proprietors of the National Wharves. On the same date the defendants presented their delivery order at the wharves, and as no question was there raised the defendants assumed that the matter was in order. The defendants did not inspect the goods, but they obtained a sample from the plaintiffs, who had inspected and sampled the goods on October 6 by their inspector and sampler. The defendants made a re-sale contract, but the sub-purchasers were unable to complete. As the defendants did not want the goods immediately they did nothing further for about six weeks, resting on what they thought was their legal position.

About December 6 or 7, 1927, the defendants sent to the company two delivery orders, the first for fifty bags and the second for a hundred bags, and pursuant to these orders 150 of the bags sold were duly delivered to the defendants. On December 12 and 13, 1927, in the ordinary course, the defendants sent delivery orders in favour of their carman, one for 100 bags and one for 35 bags, but both these orders were returned endorsed "Goods not available." The representatives of the defendants on their behalf then wrote to the company and received from them a letter dated December 13, 1927, in these terms: "With respect to your letter of this day, we very much regret to inform you that owing to irregular deliveries by our wharf, the 500 bags claimed by your clients, Messrs. Phillip Phillips & Co., Ld., do not exist. The position of the company has been placed before the Midland Bank who hold debentures, and we regret that we are unable to add anything further." It was subsequently ascertained that at the date of the contract on October 11, 1927, there were not 700 bags in the parcel at the wharves, but only 591 bags, 109 having by that time been fraudulently abstracted or irregularly delivered, and that between October 11, 1927, and December 6 or 7, 1927, other

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bags had been taken, so that on December 12, 1927, after the 150 bags had been delivered to the defendants, none were left at the wharves. The two bills of exchange, on being presented by the plaintiffs to the defendants for payment, were dishonoured by non-payment.

On May 30, 1928, the plaintiffs brought the present action against the defendants as acceptors of the two bills of exchange, or in the alternative for the price of goods sold and delivered by the plaintiffs to the defendants on October 11, 1927, and delivered on October 12, 1927.

The plaintiffs in their points of claim said that on October 11, 1927, they sold to the defendants the 700 bags of ground nuts on the terms above mentioned, that in payment for the goods and of the balance otherwise due the defendants accepted the two bills of exchange, that on October 11, 1927, the plaintiffs handed to the defendants a delivery order upon the company, that unknown to either party 109 bags had wrongfully been removed from the wharves, and that the residue, namely, 591 bags, was in possession of the company both when the contract was made and when the delivery order was handed to the defendants, that the property in the 591 bags was transferred to the defendants on October 11, 1927, when the contract was made, or alternatively on October 12, 1927, when the delivery order was handed to the defendants, and that as from one or other of these dates the 591 bags were at the risk of the defendants, and that the plaintiffs claimed the amount of the bills of exchange less the price of the 109 bags and interest thereon, or that in the alternative they claimed that amount as the price of goods sold and delivered by them to the defendants and interest thereon.

The defendants in their points of defence said, among other things, that it was an express or implied condition precedent to the defendants' liability under the contract and/or a condition of the contract that there were 700 bags of ground nuts marked as aforesaid lying at the wharves available for the plaintiffs to deliver under the contract; that it was further an express or implied condition of the contract that any

delivery order tendered thereunder should be a true, correct and effective document, and further that the goods named in the delivery order should in fact be available as represented thereby, and further that the goods should be delivered thereunder when delivery was demanded; that in breach of the condition precedent and/or condition there were not 700 bags at the wharves when the contract was made; that in breach of the contract the delivery order handed by the plaintiffs to the defendants was not a true, correct and effective document in that the goods it represented as lying at the wharves were not so lying or available for delivery; that in further breach of the contract the goods deliverable thereunder were not delivered, the company having on or about December 6 and 7, 1927, delivered 150 bags and afterwards informed the defendants that the balance, namely, 550 bags, did not exist; that the defendants denied that the property in the 591 or any number of bags was transferred to the defendants on October 11 or 12, 1927, as alleged or at all, and that if the plaintiffs appropriated or purported to appropriate 591 bags to the contract the defendants never assented to or authorized the appropriation; that the defendants admitted liability for the 150 bags, but not under the contract, and brought the sum of 180*l.* into Court in respect thereof; and that they further admitted liability for the said sum of 78*l.* and brought that sum also into Court.

On December 3 and 4, 1928, the action was tried by Wright J. without a jury.

On behalf of the plaintiffs evidence was given by Mr. George Lane, one of their directors; and by Mr. Webber, their head sampler and inspector, who said that on October 6, 1927, he went to the wharves, that he found the parcel of goods in question and took samples in the ordinary way, that he did not count the bags, as it would have been difficult to do so owing to their position, and that he assumed that the parcel was intact. Evidence was also given by the manager of the National Wharves and Warehousing Company, Ld., and by an inspector who was instructed to make certain investigations in regard to goods at the wharves.

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On behalf of the defendants evidence was given by Mr. Brinkley and others.

Rayner Goddard K.C. and *A. E. Woodgate* for the plaintiffs. By the contract of sale made on October 11, 1927, the plaintiffs sold to the defendants the parcel of bags known as Lot 7 and marked E. C. P., which was described as containing about 700 bags. At the time of sale the property in the bags included in that lot passed from the plaintiffs to the defendants. The fact that there were not 700 bags in the lot at that date but only 591 bags did not prevent the property in the 591 bags from passing when the contract of sale was made. The plaintiffs could not sell more than they had at the time of sale. Sect. 6 of the Sale of Goods Act, 1893 (1), which provides that where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract was made, the contract is void, does not apply to a case where the bulk of the goods are still in existence at the time of the sale and the purchaser thereafter exercises dominion over the goods. In such a case there is a valid sale and transfer of property in the goods which are still in existence at the time of the sale. In the present case the bulk of the goods specified were

(1) The Sale of Goods Act, 1893, provides:

Sect. 6. "Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void."

Sect. 20. "Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.

"Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault."

Sect. 30. "(1.) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.

"(2.) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate."

still in existence at the time of the sale, and the defendants exercised dominion over them by making a sub-sale of them. By s. 20 of the Act of 1893 "where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed." That provision applies to the present case. In any event the property in these bags passed when the delivery order was given by the plaintiffs to the defendants and accepted by them. Sect. 30 of the Act provides that where the seller delivers to the buyer a quantity of goods less than he contracted to sell, if the buyer accepts the goods so delivered he must pay for them at the contract rate. After the contract was made 450 bags out of the 591 disappeared. These goods perished through the failure of the defendants to take delivery of them for a period of seven weeks. Sect. 20 of the Act provides that "when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not. Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault": see also *Martineau* v. *Kitching* (1), per Blackburn J. If there were not 700 bags in Lot 7 both parties acted under a mistake and the defendants dealt with such bags as were there, and they cannot now be heard to say that the property in such bags as were there did not pass to them.

Le Quesne K.C. and *D. B. Somervell* for the defendants. The contract between the parties was for the sale of one entire parcel of 700 bags, and since at the date of the contract there were only 591 bags in existence, the subject-matter of the contract was non-existent at that date and the contract was accordingly void. In the case of a contract for the sale of a house, if, without the knowledge of the parties, the house is burned down at the date of the contract, what is left of the house is not the subject-matter contemplated by

(1) (1872) L. R. 7 Q. B. 436, 456.

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the parties; and in a case where two or more things are sold under an entire contract and one or more of them have perished at the date of the contract, the remainder of them is not what the parties had in view; and in either of these cases the contract is void: see Benjamin on Sales, 6th ed., pp. 161, 162; and the same principle applies in the present case. A contract for the sale and delivery of so many tons of goods is a contract for the sale and delivery of an indivisible parcel of goods, and if part of the goods is not forthcoming, the buyer may reject the whole: *Behrend & Co.* v. *Produce Brokers' Co.* (1) Where, as here, there is a contract for the sale of specific goods and part of the goods, without the knowledge of the seller, are non-existent at the date of the contract, s. 6 of the Sale of Goods Act, 1893, applies and the contract is void.

WRIGHT J. This is one of those unfortunate cases in which one of two innocent parties has to suffer by the fraud of a third party. The trouble has arisen because certain goods deposited in the ordinary course of business with a firm of wharfingers in London, the National Wharves and Warehousing Company, Ld., had been fraudulently abstracted while in their possession. This is the first case in my experience in which wharfingers in London, in whom great confidence has always been reposed, have failed in their trust. I do not know what individuals were guilty of the fraudulent transaction, nor does it concern me. The wharfingers are now in liquidation, and it appears from statements in a letter from them dated December 13, 1927, that any assets which they have are in the hands of the debenture holders. The result is that whoever has to suffer by the loss of these goods will, so far as I can see, have no redress from the wharfingers.

As between the plaintiffs and the defendants the matter arises in this way. The plaintiffs had purchased under a contract in writing dated October 7, 1927: "E. C. P. Lot 7. 700 bags (about 25 tons) Chinese ground nuts in shell (about equal to sample) at 26*l.* 5*s.* . . . . per ton, ex Store London.

(1) [1920] 3 K. B. 530; 25 Com. Cas. 286.

Lying at National Wharves. Gross landing weights . . . . Prompt 4th Nov. 1927 . . . . Net cash against delivery order." On October 11, in the same year, the plaintiffs entered into an oral contract with the defendants, by which they sold to the defendants "700 bags marked E. C. P. and known as Lot 7 of Chinese ground nuts in shell then lying at the National Wharves in London at the price of 28*l.* per ton to be computed by reference to the gross landing weights previously ascertained when the said goods were landed and placed in store at the said wharves." The price was computed on the gross landing weights and amounted to 727*l.* 18*s.* 3*d.*, and about that there is no dispute. In respect of that price and a further sum, which is not very material to this case, of 78*l.* 4*s.* for other goods sold by the plaintiffs to them, the defendants accepted two bills of exchange, one for 500*l.* and the other for 306*l.* 2*s.* 3*d.* each dated October 11, 1927, payable to the order of the plaintiffs. These bills of exchange were handed over to the plaintiffs on October 12, 1927, in return for a delivery order.

At the last mentioned date, in my judgment, it was intended that the property in the 700 bags should pass from the plaintiffs to the defendants. I regard this parcel as an indivisible parcel of goods within the description given by Bailhache J. in the case of *Behrend & Co.* v. *Produce Brokers' Co.* (1) In that case the parcel was a parcel of 200 tons of Egyptian cotton-seed and the learned judge there held, and I think rightly, that in commerce that was an indivisible parcel of goods. The same is certainly true, in my judgment, a fortiori of this specific parcel of 700 bags, the location of which was expressly defined in the contract. The defendants on October 12, 1927, presented their delivery order to the wharf, and as no question was there raised they thereupon assumed that the matter was in order. [His Lordship stated the facts and the effect of the evidence relating to the inspection and sampling of the goods, the delivery to the defendants of 150 bags on December 6 or 7, 1927, and the return to the defendants of the delivery orders of December 12

(1) [1920] 3 K. B. 530; 25 Com. Cas. 286.

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and 13, 1927, and continued :] It has now been ascertained and agreed that at the date of the contract on October 11, 1927, there were not 700 bags in the parcel but only 591 bags, 109 having by that time been fraudulently abstracted or irregularly delivered. In the interval between October 11 and December 6 or 7 other bags had been taken, so that on December 12, after the 150 bags had been delivered to the defendants, none were left at all.

If the whole 700 bags had remained in the wharf on October 11, 1927, the fraudulent abstraction being subsequent to that date, and the parcel intact on that date, there could be no question, I think, that the property must have passed on October 12 from the plaintiffs to the defendants. But that in fact was not so. When the contract of October 11 was made, there was not in existence any parcel such as is described in the contract. There was a parcel of 591 bags, but there was not a parcel of 700 bags.

If, on the other hand, the whole 700 bags had been stolen on October 11, 1927, without the knowledge of either party, or if it had been destroyed by fire—if for any such reason it did not exist as a parcel at all on October 11, there can be no doubt that s. 6 of the Sale of Goods Act, 1893, would have applied. [His Lordship read that section.] The section says that as the contract has reference to specific goods and as those goods, without the knowledge of the seller, are not in existence at the date of the contract, there is nothing on which the contract can operate and it is void. In other words, because the parties are contracting about something which, unknown to them, has no existence in fact, the intention of both of them is completely frustrated and there is no contract between them. The rule has been established for many years that, where a contract relates to specific goods which do not then exist, the case is not to be treated as one in which the seller warrants the existence of those specific goods, but as one in which there has been a failure of consideration and mistake.

This case raises a further problem, which, so far as I know, and so far as learned counsel have been able to ascertain,

has never hitherto come before the Court. The problem is this: Where there is a contract for the sale of specific goods, such as the parcel of goods in this case, and some, but not all, of the goods have then ceased to exist for all purposes relevant to the contract because they have been stolen and taken away and cannot be followed or discovered anywhere, what then is the position? Does the case come within s. 6 of the Sale of Goods Act, so that it would be the same as if the whole parcel had ceased to exist? In my judgment it does. The contract here was for a parcel of 700 bags, and at the time when it was made there were only 591 bags. A contract for a parcel of 700 bags is something different from a contract for 591 bags, and the position appears to me to be in no way different from what it would have been if the whole 700 bags had ceased to exist. The result is that the parties were contracting about something which, at the date of the contract, without the knowledge or fault of either party, did not exist. To compel the buyer in those circumstances to take 591 bags would be to compel him to take something which he had not contracted to take, and would in my judgment be unjust.

There is, as I have said, no authority so far on the point. There are, however, certain expressions of weight which have been referred to during the argument. In particular in Sir Mackenzie Chalmers' book on the Sale of Goods Act, 1893, 10th ed., p. 31, in a note to s. 6 of the Act there is this passage: "But if a man contracts to sell five dozen of a particular brand of champagne, it would be immaterial if unknown to him his whole stock of wine had been destroyed by fire. He must procure five dozen of that champagne elsewhere or pay damages. A mixed case might arise which is not covered by the section. Suppose a man contracts to sell to B. 'five dozen of the '74 champagne now in my cellar,' not knowing that all but three dozen had been destroyed by fire. The question has not been decided, but probably the contract would be void." I agree with that expression of opinion and adopt it in my judgment, although, in my opinion, the case put by the learned author is not so strong as the present

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case, because the contract here was for a parcel of goods which was indivisible and described in every particular. I have also been referred to certain passages in Benjamin on Sale, which I am quoting from the 6th edition of that work published in 1920. At p. 161 the author is dealing with a well known case to which I need not refer, where the contract relates to a specific chattel which at the date of the contract did not exist without either party knowing of that fact, and, after stating the rule, he says: "Pothier says: 'There must be a thing sold, which forms the subject of the contract. If then, ignorant of the death of my horse, I sell it, there is no sale for want of a thing sold. For the same reason, if when we are together in Paris, I sell you my house at Orleans, both being ignorant that it has been wholly, or in great part, burnt down, the contract is null, because the house, which was the subject of it, did not exist: the site and what is left of the house are not the subject of our bargain, but only the remainder of it.'" I think that in principle, though the facts are different, it is equally true in this case, that what was left of the parcel at the date of the contract, namely 591 bags, was not the subject of the bargain. The subject of the bargain was the entire parcel of 700 bags. On the following page the learned author deals with the perishing of part of the thing sold, and says: "Where two or more things are sold for an entire price, or otherwise under an entire contract, and one or more of them have perished at the date of the contract, it is conceived that the contract is also void as to the remainder." That in my judgment, for the reasons I have given, is an accurate statement. Then the author continues: "This was, at least, the rule of the civil law, which says: 'Si duos quis servos emerit pariter uno pretio, quorum alter ante venditionem mortuus est, neque in uno constat emptio' (1); and is in accordance with principle." It may be said that here there was an entire price, because there was a lump sum ascertained in accordance with the contract and represented by the bills of exchange; but in any case the contract, in my judgment, was an entire

(1) D. 18, 1, *de cont. empt.* 44.

contract. The general principle is also discussed in the work of Sir Frederick Pollock on Contracts, 9th ed., pp. 530 and 531.

It has been argued in this case that the acceptance of the delivery order by the wharfingers without demur constituted an appropriation of the goods and involved the passing of the property in the 591 bags, the remainder of the parcel. I do not think that that contention is sound, because there was no authority or intention on the part of either the plaintiffs or the defendants for an appropriation of anything but the 700 bags. The delivery order was for 700 bags, and the entry in the wharfingers' book would be in accordance with the delivery order, and there was no parcel of 700 bags which could be the subject of that delivery order or of that appropriation.

It was further argued, though perhaps not very strongly, that as the defendants actually took 150 bags, a part of the 700 bags, the case came within s. 30 of the Sale of Goods Act, 1893, and was to be treated as one in which there was a tender of a wrong quantity—I suppose 591 bags instead of 700 bags—and that thereupon the buyer had an option under that section of taking 591 bags, paying proportionately, as I understand the plaintiffs' contention. If that argument is sound, the amount to be paid for the goods must be limited, but in my judgment that argument is not sound. Sect. 30 is a section giving an option to the buyer where the seller does not fulfil his contract because he tenders the wrong quantity. It is obvious that no one has an option, unless he knows what is being done, and in this particular case there was no knowledge of that. This point, however, cannot arise on my first conclusion that this contract is void.

Neither, in my judgment, can it be said that any property passed to the buyers on the facts of this case by reason of any laches on the part of the buyers. It is true that the buyers, the defendants, did not inspect; it is true that they did not take the trouble to obtain actual delivery of the goods till December, but I am satisfied on the evidence that there was no unreasonable delay. But even if there had been,

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it would not have affected my conclusion that the contract is void, and that there is no contract under which the property has passed.

Still less can the position be changed by the fact that the defendants made a sub-contract under which no steps were taken to obtain any delivery of the goods. That sub-contract no doubt was equally void with the contract with which I am concerned in this action.

The result is that in my judgment the plaintiffs fail in their claim on the bills of exchange. There has been a payment into Court of 258*l.* 4*s.* arrived at in this way. There is owing from the defendants to the plaintiffs 78*l.* 4*s.*, the balance of an account, and they have tendered before action brought, as I gather, the sum of 180*l.* as representing the price of the 150 bags which they actually received. The plaintiffs therefore are entitled admittedly to the sum of 258*l.* 4*s.* which has been brought into Court, and an order will be made for that sum to be paid to them. On the actual claim, however, there will be judgment for the defendants.

Judgment accordingly.

Solicitors for plaintiffs: *Burnie & Coleman.*

Solicitors for defendants: *Keene, Marsland, Bryden & Besant.*

J. R.

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Nov. 23.

Education—Public Elementary School—Non-provided School—Playground—Improvement—Paving and Flagging—Whether Local Education Authority has Power to expend Money on such Work—Education Act, 1921 (11 & 12 *Geo.* 5, *c.* 51), *ss.* 17, 29, 170—*Audit* (*Local Authorities*) *Act*, 1927 (17 & 18 *Geo.* 5, *c.* 31), *s.* 2.

By the Education Act, 1921, s. 17, sub-s. 1: "The local education authority shall . . . . maintain and keep efficient all public elementary schools within their area which are necessary, and have the control of all expenditure required for that purpose other than expenditure for which under this Part of this Act provision is to be made by the managers. . . . ."

Sub-s. 3: "A local education authority, for the purpose of providing sufficient public school accommodation for their area, may provide, by buildings or otherwise, schoolhouses properly fitted up, and improve, enlarge, and fit up any schoolhouse provided by them. . . . ."

Sect. 29, sub-s. 2: "A local education authority shall maintain and keep efficient under this Act a public elementary school not provided by them only so long as the school is necessary and the following conditions and provisions are complied with:—

(*d*) The managers of the school shall provide the schoolhouse free of any charge, except for the teacher's dwelling-house (if any), to the local education authority for use as a public elementary school, and shall, out of funds provided by them, keep the schoolhouse in good repair, and make such alterations and improvements in the buildings as may be reasonably required by the local education authority: Provided that such damage as the local education authority consider to be due to fair wear and tear in the use of any room in the schoolhouse for the purpose of a public elementary school shall be made good by the local education authority."

Sect. 170: "The expression 'schoolhouse' in relation to an elementary school includes the teacher's dwelling-house and the playground (if any) and the offices and all premises belonging to or required for a school."

A local education authority paid for the concrete paving and flagging of the playgrounds of two non-provided schools. The expenses so incurred were disallowed by the district auditor on the ground that the local education authority had no statutory authority to expend money on alterations or improvements of a schoolhouse not provided by them. On a case stated by the Minister of Health under s. 2 of the Audit (Local Authorities) Act, 1927:—

Held, that the concrete paving or flagging of the playgrounds was not an alteration or improvement in the buildings, and that therefore the obligation to pay for such work was not thrown upon the managers of the schools by s. 29, sub-s. 2 (*d*), of the Education Act, 1921, but that the local education authority were bound to pay for such work under their obligation to maintain and keep efficient all public elementary schools within their area which are necessary.

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CASE stated by the Minister of Health under s. 2 of the Audit (Local Authorities) Act, 1927.

The appellants, the Council of the County Palatine of Lancaster, acting as the local education authority, paid certain sums entered and charged in the accounts of the Education Committee of the County Palatine as follows: "Feb. 14, 1928—R. H. Catterall and Co., 1*l.* 12*s.* 8*d.* Balance of account for concrete paving of playing ground at Kirkham-the-Willows Roman Catholic School." "Feb. 14, 1928—John Wane, 5*l.* 8*s.* 4*d.* Balance of account for concrete flagging of playground at Mawdesley Church of England School."

The respondent, Mr. J. W. Crowe, who was the district auditor for the district, which comprised the County Palatine of Lancaster, following his audit of the accounts of the appellants acting as local education authority for the period ended February 14, 1928, by certificate dated February 21, 1928, disallowed the items of 1*l.* 12*s.* 8*d.* and 5*l.* 8*s.* 4*d.* for the reason, as stated in his certificate, that the local education authority had no statutory authority to expend the funds in their hands on alterations or improvements to a schoolhouse not belonging to them.

On February 29, 1928, the appellants appealed to the Minister of Health under s. 2, sub-s. 1, of the Audit (Local Authorities) Act, 1927, against the disallowance of those sums, and requested the Minister to state in the form of a special case for the opinion of the Court the questions of law arising.

The following facts were admitted:—

The Kirkham-the-Willows Roman Catholic School and the Mawdesley Church of England School were both public elementary schools within the meaning of the Education Act, 1921, not provided by the local education authority, but necessary within the meaning of the Education Act, 1921. The sums disallowed by the respondent represented the balance of expenditure in respect of improvements to the playgrounds in the schools, and those improvements were necessary for the efficiency of the schools.

It was contended on behalf of the appellants in answer to the reasons advanced by the respondent as set out in his certificate disallowing the said sums, as follows: The test whether a school was being properly maintained and kept efficient was the same whether the school was or was not provided by the local education authority. The expenditure in question was not expenditure in relation to the repair of a schoolhouse or in relation to the alteration and improvement of buildings, and did not therefore fall to be paid by the managers of the schools under s. 29, sub-s. 2 (*d*), of the Education Act, 1921, or at all. The expenditure was expenditure which under s. 17, sub-s. 1, of the Act the appellants, as the local education authority, were empowered to make. The appellants, as that authority, were bound to provide and to carry out the improvements in question pursuant to the duty imposed on them by s. 29, sub-s. 2, of the Act to maintain and keep efficient the schools.

The question for the opinion of the Court was whether the appellants, as the local education authority, had power to expend money in making the said improvements to the playgrounds of the schools.

Wilfrid Greene K.C. and *R. Etherton* for the appellants. The Education Act, 1921, by s. 17, sub-s. 1, imposes an obligation upon a local education authority to maintain and keep efficient all public elementary schools within their area which are necessary. That obligation, by s. 29, sub-s. 2, extends to a public elementary school not provided by them so long as the school is necessary, provided that certain conditions and provisions are complied with. One of those conditions is set out in para. (*d*), and is to the effect that "the managers of the school shall provide the schoolhouse free of any charge, except for the teacher's dwelling-house (if any), to the local educational authority for use as a public elementary school, and shall, out of funds provided by them, keep the schoolhouse in good repair, and make such alterations and improvements in the buildings as may be reasonably required by the local education authority. . . . ." By s. 170: "The

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expression 'schoolhouse' in relation to an elementary school includes the teacher's dwelling-house and the playground (if any) and the offices and all premises belonging to or required for a school," but that definition does not extend so as to include "buildings." It is clear that a distinction is drawn in s. 29, sub-s. 2 (*d*), between "the schoolhouse," which term includes the playground, on the one hand, and "buildings" on the other, so that the managers of a non-provided school must provide the schoolhouse and the playground (if any) and keep them in good repair, but that their liability to make alterations and improvements extends only to buildings. They are under no obligation to alter or improve the playground, which duty therefore falls on the local education authority. Although there is an obligation on the managers of a non-provided school to do repairs and make alterations to the school buildings, there is also an overriding obligation upon the local education authority to maintain and keep efficient the school. If the provision of a flagged or concreted playground is necessary for the efficiency of the school the managers are not liable to pay for the work, because such work does not come within their obligation to keep the playground in good repair. The Minister of Health has found in the Case that the concreting of the playgrounds is not a repair, and therefore it is an improvement, and the local education authority are bound to do such work under their obligation to maintain and keep efficient the school, which obligation is quite general and covers the physical side of the school as well as the educational side. Lord Halsbury made some important observations in *Ching* v. *Surrey County Council* (1) upon the meaning of the words "maintain and keep efficient." The school in question in that case was a provided school. He said: "In my opinion, the words 'maintain and keep efficient,' as applied to a school, must necessarily include, not only what has been described as the 'scholastic system' which is to be enforced, but also the place where the duty is to be performed by those who are under the main duty of keeping the school efficient for the scholars.

(1) [1910] 1 K. B. 736, 742.

Whatever may be necessary for the purpose of performing the main duty appears to me to be included in the general description of 'keeping the school efficient.'" The words "maintain and keep efficient" have a meaning no less wide in the case of a non-provided school than they have in the case of a provided school. Lord Loreburn L.C. said in *Attorney-General* v. *West Riding of Yorkshire County Council* (1) that "the duty to 'maintain' is not confined to voluntary schools, for the section applies to board schools as well," and Lord Davey said (2): "It becomes, therefore, important to examine a little more closely what is the exact statutory obligation imposed on the local authority by s. 7 of the Act of 1902. The local authority is to maintain and keep efficient 'all public elementary schools within their area which are necessary.'" The House of Lords in that case therefore held that there was an overriding obligation upon the local education authority to maintain and keep efficient all schools in their area. In *Rex* v. *Easton. Ex parte Oulton* (3) the Court of Appeal held that a local education authority by reason of their obligation under the Education Act, 1902, "to maintain and keep efficient all public elementary schools within their area which are necessary" had power to pay for new furniture required to equip a new non-provided school as a public elementary school. Lord Alverstone C.J. in that case said (4): "It is not suggested that there is any provision in the Act for the expenditure of this money by the managers, and in my judgment that omission points to the fact that the local education authority are to be responsible for the equipment of the school as distinguished from the building." If there is no express statutory obligation placed upon the managers of a non-provided school to do any act which is necessary in order that the school may be maintained and kept efficient there is strong reason for thinking that the legislature intended to impose the obligation to do that act upon the local education authority, and that it is not a casus omissus. It is not possible to construe the expression "buildings" with an extended

(1) [1907] A. C. 29, 36.
(2) Ibid. 37, 38.
(3) [1913] 2 K. B. 60.
(4) Ibid. 71.

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meaning so as to include playgrounds, whereas the expression "schoolhouse" has been given an extended meaning. It is a good rule of construction that two different words are not used in a statute to mean the same thing. The legislature in using the term "building" in s. 29, sub-s. 2 (*d*), two lines after using the term "schoolhouse," did not mean schoolhouse. It is necessary to look at the scheme of the Act and see what obligations have been imposed upon the managers. When that is looked at it is evident that the legislature has not put any obligation upon the managers of a non-provided school to make alterations and improvements to playgrounds, and therefore the obligation to do such work is on the local education authority under their general obligation to maintain and keep efficient all public elementary schools in their area which are necessary.

R. M. Montgomery K.C. and *H. P. Glover* for the respondent. A local education authority has no right to expend the money of the ratepayers upon the paving of the playground of a non-provided public elementary school, whether the paving be a repair or an improvement to the playground. A repair may also be an improvement, and an improvement may also be a repair. If the local education authority really possess such a right to expend money as has been suggested it means that the ratepayers' money may be expended upon buildings belonging to private persons and which may afterwards go back into the possession and enjoyment of such private persons. It would require very clear words to show that the legislature had contemplated such expenditure.

[AVORY J. It is clearly contemplated in the proviso to s. 29, sub-s. 2 (*d*), that money shall be expended by a local education authority in making good damage due to fair wear and tear in the use of any room in the schoolhouse.]

We are speaking of money expended on alterations and improvements. The provision in s. 17, sub-s. 1, of the Act of 1921 that "the local education authority . . . . shall . . . . maintain and keep efficient all public elementary schools within their area which are necessary" applies both to provided and to non-provided schools, but that provision does not

apply to the maintaining of the fabric of the schoolhouse in the case of a provided school, still less does it apply to the maintaining of the fabric of a non-provided school, the duty in regard to which is cast upon the managers by s. 29, sub-s. 2 (*d*). The duty imposed upon the local education authority by s. 17, sub-s. 1, to maintain and keep efficient all elementary schools in their area refers to maintaining the schools as scholastic institutions and not to maintaining the fabric of the schools. Sub-s. 3 of s. 17 imposes upon the local education authority an obligation to provide sufficient school accommodation and for that purpose to provide schoolhouses properly fitted up, and improve, enlarge and fit up any schoolhouse provided by them, and to supply school apparatus and everything necessary for the efficiency of the school. That sub-section deals with the improvement of the schoolhouses of a provided school, and therefore the words "maintain and keep efficient" in sub-s. 1 of s. 17 do not refer to improvements to schoolhouses, otherwise sub-s. 3 would be redundant. The provision in sub-s. 3 covers everything necessary in the way of repairs to the fabric of the school, and likewise furniture necessary for a school. The words "maintain and keep efficient all public elementary schools within their area" in sub-s. 1 of s. 17 do not impose upon a local education authority an obligation to flag and pave the playgrounds of non-provided schools, because the words only apply to maintaining and keeping efficient schools as scholastic institutions. Even if the word "buildings" in s. 29, sub-s. 2 (*d*), does not include the playground of a non-provided school, so that the obligation to make alterations and improvements thereto is not cast upon the managers, it does not follow that the liability to repair and improve such playground is thereby cast upon the local education authority. It does not follow because a local education authority are under an obligation to maintain and keep efficient all non-provided schools within their area which are necessary that they are entitled to say to the managers that they require large improvements to be made to the school, and nevertheless not ask the managers to pay for such improvements. Neither

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are a local education authority entitled to say that reasonable improvements ought to be made to a non-provided school, but nevertheless not ask the managers to do the work because they have a difficulty in raising the necessary money. Neither can the managers of a non-provided school say that because the local education authority are under a liability to maintain and keep efficient all public elementary schools within their area, that therefore they are bound to pay for improvements to a non-provided school. It does not follow because certain expenditure is thrown upon the managers of non-provided schools that therefore the local education authority are entitled, or are bound, to expend money for all other purposes necessary to maintain and keep efficient those schools. There may be a gap between the purposes for which a local education authority may expend money and the purposes for which the managers of a non-provided school may be required to expend money. Lord Alverstone C.J. said in *Rex* v. *Easton* (1): "In my judgment the language of cl. (*d*) of s. 7, sub-s. 1 [of the Education Act, 1902], clearly indicates that the only responsibility placed upon the managers when they come into existence is the obligation to provide and to improve the schoolhouse from time to time." The managers of a non-provided school are under an obligation to provide the schoolhouse, teacher's dwelling-house, the playground, and all premises belonging to or required for a school, and they are to continue to provide those things from time to time; the obligation to provide those things is not fulfilled once for all, but continues. Therefore the managers have to provide a playground in a proper state, and under s. 29, sub-s. 2 (*d*), they are under an obligation to "keep the schoolhouse in good repair, and make such alterations and improvements in the buildings as may be reasonably required by the local education authority." It is found in the case that the flagging and paving of the playground were reasonable, and therefore if required by the local education authority they would be reasonably required. The word "building" is used in that sub-section in an extended sense, and it covers

(1) [1913] 2 K. B. 69.

paving in a playground. It is not contended that the words "schoolhouse" and "building" as used in this sub-section are synonymous, but a playground comes within the word "building." The word "schoolhouse" could not have been used where the word "building" is used, as it would have been too wide.

[LORD HEWART, C.J. Can the words "alterations and improvements in the buildings" be construed so widely as to include alterations and improvements to something which is not a building but which may become a building after the alterations and improvements have taken place?]

It is necessary to look at the totality of the thing called the building. It is not confined to land already covered by buildings.

Wilfrid Greene K.C. in reply. The argument that the provision in s. 29, sub-s. 2 (*d*), that "the managers of the school shall provide the schoolhouse" means that they shall provide it from time to time, and therefore implies that they shall maintain and keep efficient the school, is an untenable one. The term "provide" is a technical one, and is taken from ss. 18 and 19 of the Education Act, 1870. It is clear from s. 29, sub-s. 2 (*d*), of the Act of 1921 that the term does not include doing repairs and making improvements, because those things are expressly provided for by the section. It is clear from the decision of the Court of Appeal in *Ching* v. *Surrey County Council* (1) that the words "maintain and keep efficient" in s. 17, sub-s. 1, of the Act of 1921, do not relate merely to the school as a scholastic institution, but relate also to the keeping of the school premises in a state of repair. The opinion to the contrary expressed by Phillimore J. in *Morris* v. *Carnavon County Council* (2) must now be treated as overruled by the decision of the Court of Appeal in *Ching's* case. (1) The object of sub-s. 3 of s. 17 of the Act of 1921 is to secure the provision of sufficient school accommodation, and it does not deal with the upkeep of school accommodation which has been provided under sub-s. 1 of that section. The sub-section has nothing to do with the

(1) [1910] 1 K. B. 736. (2) [1910] 1 K. B. 159, 167.

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maintaining of the things which have been provided. The legislature in s. 29, sub-s. 2 (*d*), of the Act of 1921 drew a distinction between "buildings" and "schoolhouse" which includes a playground. The putting of flagstones or concrete upon bare earth or grass is not improving a building. In order to alter or improve a building there must be a building in existence previously which is being altered or improved. A building means ground covered with bricks and mortar. A flagged playground is no more a building than a concreted playground.

LORD HEWART C.J. This is a special case stated by the Minister of Health for the opinion of the Court under s. 2, sub-s. 1, of the Audit (Local Authorities) Act, 1927. The question is whether the appellants, as local education authority, have power to expend money in making certain improvements to the playgrounds of two non-provided schools, those improvements consisting in the laying of concrete paving in one case and of concrete flagging in the other case. Many questions have been debated in the course of a very interesting argument, but it seems to me that the question which has to be decided is capable of brief statement.

Under s. 29, sub-s. 2, of the Education Act, 1921, it is provided that: "A local education authority shall maintain and keep efficient under this Act a public elementary school not provided by them only so long as the school is necessary," and certain conditions and provisions are complied with. And then follow in para. (*d*), under that sub-section, certain matters of composite structure and debatable meaning. The scheme of the paragraph is curious, and the interpretation of it is by no means easy. The paragraph provides: "The managers of the school shall provide the schoolhouse free of any charge, except for the teacher's dwelling-house (if any), to the local education authority for use as a public elementary school, and shall, out of funds provided by them, keep the schoolhouse in good repair, and make such alterations and improvements in the buildings as may be reasonably

required by the local education authority: Provided that such damage as the local education authority consider to be due to fair wear and tear in the use of any room in the schoolhouse for the purpose of a public elementary school shall be made good by the local education authority." It is tolerably obvious that whatever may be the true meaning of this part of this section, a little more care in drafting it would have put the matter beyond doubt. There are here many contrasts, a contrast between school and schoolhouse, a contrast between buildings and something not buildings, a contrast between the repair of a schoolhouse and a school itself. The matter is further complicated by the fact that when one comes to s. 170, the definition section, the term "schoolhouse" has manifestly an extension of meaning beyond the meaning which it has in ordinary usage. Sect. 170 says: "The expression 'schoolhouse' in relation to an elementary school includes the teacher's dwelling-house and the playground (if any) and the offices and all premises belonging to or required for a school." In order to appreciate therefore the force of one particular antithesis in this cumbrous passage, it may be well to read the whole passage inserting the extended definition. The passage would then read in this way: "The managers of the school shall provide the schoolhouse, including the teacher's dwelling-house and the playground, and the offices and all premises belonging to or required for a school, free of any charge, and shall, out of funds provided by them, keep the schoolhouse, including the teacher's dwelling-house and the playground and the offices and all premises belonging to or required for a school, in good repair, and make such alterations and improvements in the buildings as may be reasonably required by the local education authority." Then follows the proviso about damage due to fair wear and tear in the use of any room in the schoolhouse.

The argument which has been urged on behalf of the appellants is, in brief, that it is inconceivable that the term "schoolhouse" and the term "the buildings" in consecutive lines in this sub-section are synonymous. "Inconceivable"

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is a difficult word to use about the construction of a statute, but it would certainly seem odd that the term "the schoolhouse" should be used twice in the first half dozen lines of this part of the sub-section, and that when the sub-section thereafter passes from provision of the schoolhouse on the one hand and repair of the schoolhouse on the other hand to the topic of improvements it should introduce a new limiting expression, "the buildings."

It is conceded on behalf of the respondent, the auditor, in argument, that the extended definition of the expression "schoolhouse" in s. 170 comprises some things which are obviously buildings, some things which are not buildings, and some things of which the character is doubtful—things which must be ascertained in relation to the particular circumstances of each case. Certainly it seems a little strange to say that the term "the buildings" is applicable indifferently to the schoolhouse, the teacher's dwelling-house, the playground, the offices, and all the premises belonging to or required for a school. It is conceded in argument that it would be difficult, for example, to say that the garden belonging to the teacher's dwelling-house was a part of the buildings.

Once, therefore, it is conceded that, through carelessness or otherwise, this Act in this part has used two different expressions for the same thing, and that the meaning of the term "the buildings" is not necessarily the same as the meaning of the term "the schoolhouse," the inquiry seems to be remitted to the more simple one: Is it true to say that the concrete paving of a playground or the concrete flagging of a playground is "an alteration or an improvement in the buildings"? It is to be observed that the expression there is not "*to* the buildings," but "*in* the buildings."

It has been stated—and the statement has not been contradicted—that before this concrete paving or concrete flagging was carried out these playgrounds were ordinary gravel playgrounds; in other words, the paving and the flagging made their appearance for the first time upon the empty earth of the former playground. Is it true to say that that

work is of the nature of "alterations or improvements in the buildings" within the meaning of this section? One can conceive a sense in which it may be said to be an improvement *to* a building that its yard should be flagged instead of being left unflagged, but could it be said to be an improvement *in* the buildings? And, in particular, could it be fairly said to be an improvement in the buildings where a contrast seems to be pointed by the context between that which is a building properly so called and that which is not? I confess I was attracted for the time by the argument of Mr. Montgomery on behalf of the respondent, nor does it seem to me that the question is free from difficulty. But the argument of Mr. Wilfrid Greene has convinced me that the view which is here put forward by the appellants is the better view upon the true construction of this statute.

It was faintly suggested by Mr. Montgomery that even if it be the case that the work which has been done is not an improvement in the buildings so as to entitle the local education authority to require the managers of the school to carry out the work, nevertheless, it does not follow that there is any responsibility upon the local education authority to pay for it; nay, more, it is suggested that they are not entitled to pay for it. That argument seems to me to depend upon a confusion, if I may say so with all respect, between certain uses of the word "school" in certain sections of this statute. No doubt the word "school" is sometimes used as indicating the curriculum or scholastic system of the school; in other places it is used as indicating the fabric of the school; and again in other places it is used as indicating the totality of the school-fabric, curriculum and all. But I am not at all satisfied by the argument that these words imposing the duty to maintain and keep efficient under the Act a public elementary school are limited to the maintenance and keeping efficient of the curriculum. Indeed in this very section, s. 29, sub-s. 2, not to carry the inquiry further, it seems to me clear that the word "school" is used with reference both to the fabric and to the curriculum. It provides that: "A local education authority shall maintain and keep efficient

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under this Act a public elementary school not provided by them only so long as the school is necessary," and then follow provisions evidently relating to the provision of the physical fabric of the school.

It was further suggested by Mr. Montgomery, by way of reductio ad absurdum, that if the contrary view to that particular view is right, a local education authority might, by some benevolent dispensation, refrain from requiring school managers to make alterations and improvements in the buildings which were reasonably required, and might carry out such alterations and improvements at their own charges, not having power to do so. That does not seem to me to be a very formidable reductio ad absurdum. It seems to involve this hypothesis, that the local education authority, in a mood of benevolence at other people's expense, have carried out certain alterations and improvements which they might have asked, and ought to have asked, the local managers to carry out. If that course were really followed I cannot suppose that there would be any difficulty on the part of the auditor in dealing suitably with the local education authority.

Upon the whole, not without hesitation and diffidence, I have come to the conclusion that this appeal ought to be allowed, and that the answer to the question is: that the appellants as local education authority have power to expend money in making the improvements which are referred to.

AVORY J. I agree that this appeal should be allowed. The question for the opinion of the Court is correctly stated in para. 6 of this case—namely, "whether the appellants as local education authority had power to expend money in making the said improvements to the playgrounds of the schools?" I think, with my Lord, that the answer to that question should be in the affirmative.

I observe that the auditor in his certificate gives as his reason that the local education authority had no statutory authority to expend the funds in their hands on alterations

or improvements of a schoolhouse not belonging to them. In that form he appears to me to have—no doubt inadvertently—decided the very question which is in dispute here, because it is obvious in that form of his certificate he has treated the schoolhouse as including the playground, which is really the question to be determined under s. 29, sub-s. 2, para. (*d*), of the Education Act, 1921.

Now it must be taken that the work which was to be done on these playgrounds was an improvement, and not merely a repair; and further it is found in the case as a fact that the said improvements were necessary for the efficiency of the schools. That, I think, is of great importance, bearing in mind the opening words of sub-s. 2 of s. 29, that a local education authority shall maintain and keep efficient a public elementary school not provided by them. Then, it being once admitted that the work which was done was an improvement and not a repair, it seems to me that the simple question to be decided (when I say the simple question, I do not mean it is easy to decide) is whether under para. (*d*) of sub-s. 2 of s. 29 the managers of the school are made liable to pay the cost of that improvement in the playground, or whether the obligation remains upon the local education authority. In my view a good deal of the difficulty which arises from the use of the word "schoolhouse" and the use of the word "buildings" in juxtaposition in that paragraph is removed when one looks at the interpretation section—namely, s. 170—and the exact form of it. The form of it is: "The expression 'schoolhouse' in relation to an elementary school includes the teacher's dwelling-house and the playground (if any). . . . ." It is not in a form which is sometimes found in interpretation clauses, that the word so-and-so shall mean wherever used in this Act so-and-so, but the word used is "includes," and I believe there are many decisions to the effect, that where an interpretation clause says that a word "shall include" so-and-so, that means that where necessary for giving effect to the Act, the word shall include something which, prima facie, it does not include. Where the interpretation clause says that the word wherever used

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AVORY J.

in the Act "shall mean" so-and-so, then of course it is impossible to put any other meaning upon it wherever it is used in the Act. In the light of that definition it appears to me that a good deal of the difficulty is removed from the construction of this paragraph in s. 29, sub-s. 2 (*d*): "The managers of the school shall . . . . keep the 'schoolhouse' in good repair." Now there I think the word "schoolhouse" is used in the sense in which it would ordinarily be understood —namely, as the house; and it is not there used in the extended sense given to it in this definition clause, and that it does not include, and was not intended to include, the playground. If that is so there is no difficulty in holding that the following words: The managers of the school shall "make such alterations and improvements in the buildings as may be reasonably required by the local education authority," do not impose upon the managers an obligation to make an improvement in the playground. In other words, it gives effect to what must have been the intention of the Legislature—namely, to draw a distinction between what might be a playground and what might be a building—and it imposes upon the managers an obligation to make improvements in the buildings as distinguished from anything which might possibly be included under the word "schoolhouse," and in my view it cannot be said that these playgrounds ever formed part of the buildings of these schools. Once it is admitted that neither of them had previously been either flagged or paved, it cannot, I think, be said that an ordinary playground either of grass or of earth was ever part of the building.

For these reasons I think that the auditor came to a wrong conclusion, and that the appeal should be allowed.

ACTON J. I agree. I have felt during the argument, and indeed I still feel, very considerable doubt about the matter, and I was very strongly impressed by the argument of Mr. Montgomery, but after hearing Mr. Wilfrid Greene's reply, and especially having regard to the weight and authority that there is in this Court on the other side, I think that in a

somewhat difficult and complicated matter, turning as it does on a very fine point, the right course is to say that this appeal ought to be allowed, and therefore I agree.

Appeal allowed. (1)

Solicitors for appellants: *Greenwell & Co., for Sir George Etherton, Preston.*

Solicitors for respondent: *Sharpe, Pritchard & Co., for Cotman & Son, Preston.*

(1) The questions (1.) whether the Court had power to order payment of the costs of the appellants; (2.) whether the Court had power to order payment of the costs of the respondent out of the funds of the local education authority; and (3.) whether the Court had power to give the respondent leave to appeal to the Court of Appeal were subsequently argued on November 26 and December 19, 1928, when the Divisional Court held, as reported on the next following page, that on the true construction of s. 50 of the Supreme Court of Judicature (Consolidation) Act, 1925, and s. 2 of the Audit (Local Authorities) Act, 1927, the costs were in the discretion of the Minister of Health, and that the Court had power to grant the respondent leave to appeal; and accordingly ordered that the question of costs should be left to the Minister, and that the respondent should have leave to appeal.

No appeal however was brought against the decision of the Divisional Court.

R. F. S.

1928
Dec. 19.

COUNCIL OF THE COUNTY PALATINE OF LANCASTER *v.* CROWE (No. 2).

Education—Public Elementary School—Non-provided School—Improvement—Expenditure by Local Education Authority—Disallowance by District Auditor—Appeal to Minister of Health—Case stated by Minister for Divisional Court—Decision on Merits in Favour of Local Authority—Jurisdiction as to Costs—Right of Divisional Court to give Leave to appeal to Court of Appeal—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 50—*Audit (Local Authorities) Act*, 1927 (17 & 18 *Geo.* 5, *c.* 31), *s.* 2.

The Divisional Court having allowed an appeal on a case stated by the Minister of Health under the Audit (Local Authorities) Act, 1927, raising the question whether or not the respondent, a district auditor, had rightly disallowed certain sums paid by the appellants, a local education authority, for paving the playgrounds of two non-provided schools :—

Held, on the construction of the provisions of s. 2 of the Act, that the questions of the appellants' costs of the appeal, and of the respondent's right to be paid his costs of the appeal out of the funds of the appellants, were in the discretion of the Minister of Health.

Held, further, on the construction of these provisions, that the Court had power to grant the respondent leave to appeal from its decision to the Court of Appeal.

CASE stated by the Minister of Health under s. 2 of the Audit (Local Authorities) Act, 1927.

The appellants, the Council of the County Palatine of Lancaster, acting as the local education authority, paid certain sums, entered and charged in the accounts of the County Palatine, for concrete paving of the playgrounds at two non-provided schools within their district.

The respondent, Mr. J. W. Crowe, who was the district auditor, disallowed these sums, for the reason that the local education authority had no statutory right to expend the funds in their hands on alterations or improvements to a schoolhouse not belonging to them.

The appellants appealed to the Minister of Health under s. 2, sub-s. 1, of the above mentioned Act against the disallowance of these sums, and requested him to state in the form of a special case the question of law arising for decision ; and the Minister did so accordingly.

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The Court (Lord Hewart C.J., Avory and Acton JJ.) allowed the appeal, holding that the appellants, as the local education authority, had power to expend the sums in question. For a report of that decision see p. 587 ante.

The case now came again before the Court for the determination of the following questions, which had been left undecided at the previous hearing—namely :—

Whether the Court had power to order payment of the costs of the appellants.

Whether the Court had power to order payment of the costs of the respondent out of the funds of the local education authority; and

Whether the Court had power to give the respondent leave to appeal to the Court of Appeal.

Wilfrid Greene K.C. and *R. Etherton* for the appellants. The appellants, having succeeded in their appeal on the merits, are entitled to their costs of the appeal. This Court has jurisdiction under the Audit (Local Authorities) Act, 1927, s. 2, sub-s. 5 (1), to grant the appellants their costs.

Montgomery K.C. and *H. P. Glover* for the respondent. The appellants are not entitled to costs. Further, this

(1) The Supreme Court of Judicature (Consolidation) Act, 1925, provides, s. 50: "(1.) Subject to the provisions of this Act and to Rules of Court and to the express provisions of any other Act, the costs of and incidental to all proceedings in the Supreme Court . . . . shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and to what extent the costs are to be paid."

The Audit (Local Authorities) Act, 1927, provides, s. 2: "(1.) . . . . Any person aggrieved by a disallowance or surcharge of a district auditor may [in such a case as the present] . . . . appeal either to the High Court or to the Minister of Health. . . . .

"Where an appeal is made to the Minister under this sub-section, he may . . . . state in the form of a special case for the opinion of the Court any question of law arising in the course of the appeal, but save as aforesaid the decision of the Minister shall not be subject to appeal to any Court.

"(3.) Provision may be made by Rules of Court for regulating appeals and applications to the High Court under this section. . . . .

"(5.) The provisions as to the payment of costs applicable to appeals under any enactment repealed by this Act shall apply to appeals and applications to the Court under this section."

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Court has no jurisdiction to grant them costs. The general jurisdiction of this Court to award costs now depends upon the Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 50, sub-s. 1 (1), and under that provision the Court has no jurisdiction to award costs in any case in which the costs are otherwise provided for by some other Act. Thus in *In re Knight and Tabernacle Permanent Building Society* (2) it was held that the High Court had no power to make an order as to the costs of a special case under the Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 19, inasmuch as these costs were provided for by that Act. Similarly, in the present case, this Court has no power to grant the appellants their costs of this special case stated by the Minister of Health for the opinion of this Court under the Audit (Local Authorities) Act, 1927, s. 2, inasmuch as sub-ss. 1, 3 and 5 of that section, on their true construction, provide that these costs are in the discretion of the Minister.

If the appellants are entitled to their costs, the respondent, the district auditor, is also entitled to his costs, and to an order for payment of these costs out of the funds of the local authority.

The respondent asks for leave to appeal from the decision of this Court to the Court of Appeal. This being a special case stated by the Minister for this Court, there is prima facie no right of appeal from the decision of this Court except by its leave. Under the provisions of s. 2 of the Act of 1927 (1), this Court has power to grant leave to appeal.

Greene K.C. in reply. The appellants are entitled to their costs. The costs are in the discretion either of the Minister or of this Court. It may be that in s. 2, sub-s. 5, of the Act of 1927 (1), the word "appeals" means appeals to the Minister, and if so the costs are in the discretion of the Minister.

LORD HEWART C.J. On the construction of the statutory provisions it appears to me that the costs in question are in

(1) See note (1) ante, p. 605. (2) [1892] 2 Q. B. 613.

the discretion of the Minister of Health, and also that this Court has power to grant the respondent leave to appeal from its decision to the Court of Appeal. I am therefore of opinion that the questions of costs here raised should be left to the determination of the Minister of Health; and that the question whether this Court has power to grant the respondent leave to appeal to the Court of Appeal should be answered in the affirmative, leave to appeal being consequently granted to the respondent.

AVORY and ACTON JJ. agreed.

Order accordingly.

Solicitors for appellants: *Greenwell & Co., for Sir George Etherton, Preston.*

Solicitors for respondent: *Sharpe, Pritchard & Co., for Colman & Son, Preston.*

J. R.

1929
Jan. 21, 22.

ANSELL *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamps—Settlement—Transfer—Voluntary Disposition inter vivos—Inclusion in Settlement of Government Stocks with other Stocks and Life Policies—Transfer of Policies by Settlement—Duty payable as regards Government Stocks—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 4, *First Sched., General Exemptions—Finance* (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 74, *sub-ss.* 1, 4.

By the Stamp Act, 1891, s. 4 (*a*): "Any instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the matters."

First Schedule: "General Exemptions from all Stamp Duties. (1.) Transfer of shares in the Government or Parliamentary stocks or funds."

By the Finance (1909–10) Act, 1910, s. 74, sub-s. 1: "Any conveyance or transfer operating as a voluntary disposition inter vivos shall be chargeable with the like stamp duty as if it were a conveyance or transfer on sale, with the substitution in each case of the value of the property conveyed or transferred for the amount or value of the consideration for the sale. . . . ."

Sub-s. 4: "Where any instrument is chargeable with duty both as a conveyance or transfer under this section and as a settlement under the heading 'SETTLEMENT' in the First Schedule to the principal Act, the instrument shall be charged with duty as a conveyance or transfer under this section, but not as a settlement under the principal Act."

A deed of settlement, which operated as a voluntary disposition inter vivos, was made of certain stocks, shares, marketable securities and policies of life insurance, including certain Government stocks. The settlement operated as a transfer of the policies of life assurance, but the stocks, shares and marketable securities were subsequently transferred to the trustees of the settlement by separate transfers. Ad valorem "voluntary disposition" duty under s. 74 of the Finance 1909–10 Act, 1910, was subsequently paid or assessed, without dispute, in respect of the stocks, shares and marketable securities and policies of life insurance, with the exception of the Government stocks which were exempt from duty or transfer by the General Exemptions from all Stamp Duties in the First Schedule to the Stamp Act, 1891. The Commissioners held that the settlement was also chargeable with ad valorem "settlement" duty on the value of the Government stocks included in it. The settlor however contended that no duty was payable in respect of those stocks, as they were included in the settlement with other stocks in respect of which ad valorem transfer duty and not settlement duty was payable under s. 74, sub-s. 4, of the Finance 1909–10 Act, 1910:—

Held, that the Government stocks were distinct matters, within s. 4 (*a*) of the Stamp Act, 1891, from the other property dealt with by the settlement, and therefore the settlement could be separately charged as if it were a separate instrument with settlement duty in respect of the Government stocks.

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CASE stated by the Commissioners of Inland Revenue pursuant to s. 13 of the Stamp Act, 1891.

On March 12, 1928, an instrument dated March 2, 1928, being the settlement, a copy of which was annexed to and formed part of the case, was presented on behalf of Albert Edward Ansell (hereinafter called "the appellant") by his solicitor to the Commissioners of Inland Revenue (hereinafter called "the Commissioners") under the provisions of s. 12 of the Stamp Act, 1891, for the opinion of the Commissioners as to the stamp duty with which the instrument was chargeable.

The said instrument (hereinafter called "the settlement") was a deed of settlement made under the provisions of 53 Vict. c. 5 and amending Acts, and s. 171 of the Law of Property Act, 1925, or other statutory provisions, of certain stocks, shares, marketable securities and policies of life insurance belonging to Edward Ansell (in the said settlement described as "the settlor") by the appellant acting as his receiver pursuant to an order of the High Court of Justice made in the matter of Edward Ansell and dated February 28, 1928. A copy of the order of Court was annexed to and made part of the case. The settlement was made between Edward Ansell (acting by the appellant as aforesaid) of the one part, and Alfred Inman Sherwin, the appellant, and Wilfred Bigwood, as trustees of the settlement, of the other part. The stocks, shares and marketable securities were mentioned in the first schedule to the settlement, and the policies of life insurance in the second schedule to the settlement, as follows:—

THE FIRST SCHEDULE.

13 100*l.* 4½ per cent. debentures in Ansell's Brewery, Ld.

3442 5*l.* preference shares in Ansell's Brewery, Ld.

37,500 5*l.* ordinary shares in Ansell's Brewery, Ld.

5 shares of 100*l.* each of the Droitwich Canal Navigation.

20 shares of 5*l.* each of the Birmingham Crematorium Company, Ld.

2 shares of 10*l.* each of the Red Lion and Waverley Hotels Company, Ld.

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FUND IN COURT.

2000*l.* Bank Line, Ld., 5 per cent. Guaranteed Debenture Stock, 1928–44.

2000*l.* Silver Line, Ld., 5 per cent. Debenture Stock, 1930–50 (Script Certificates).

2000*l.* Synthetic Ammonia Nitrates, Ld., 5 per cent. Guaranteed Debenture Stock, 1930–45.

500*l.* Kassala Railway, Ld., 4½ per cent. Guaranteed Debenture Stock, 1934–53.

13,000*l.* Registered 4 per cent. Victory Bonds.

4937*l.* 19*s.* 6*d.* New Zealand Government 5 per cent. Stock, 1946.

4000*l.* Birmingham Corporation 5 per cent. Stock, 1946–56.

2840*l.* 15*s.* 3½ per cent. Conversion Stock.

20,882 1*s.* 6*d.* 4½ per cent. Conversion Stock.

THE SECOND SCHEDULE.

Life policy for 10,000*l.* in Liverpool and London and Globe Insurance Company.

Life policy for 5000*l.* in Scottish Widows Fund Life Assurance Society.

Life policy for 5000*l.* in Prudential Assurance Company.

The policies of assurance were assigned to the trustees of the settlement by the settlement itself (clause 6), the stocks, shares and marketable securities were transferred to the trustees by separate instruments.

The stocks and marketable securities described under the head " Fund in Court " in the first schedule to the settlement had not been transferred to the trustees at the date of the settlement, and stood in the name of the Accountant-General of the Supreme Court of Judicature, and represented investments belonging to the settlor and transferred into Court by order of the Master, and investments representing accumulations of income of such investments. These stocks and marketable securities standing in the name of the Accountant-General of the Supreme Court were afterwards transferred by the Accountant-General to the trustees of the settlement by several instruments of transfer on or about

April 12, 1928, and these transfers (with the exception of the transfers of the 13,000*l.* 4 per cent. registered Victory Bonds, the 4937*l.* 19*s.* 6*d.* New Zealand Government 5 per cent. Stock, 1946, the 2840*l.* 15*s.* 3½ per cent. Conversion Stock and the 20,882*l.* 1*s.* 6*d.* 4½ per cent. Conversion Stock, which were not liable to duty, in the case of the Government or Parliamentary Stocks or funds by reason of the general exemption contained in the First Schedule to the Stamp Act, 1891, and in the case of the New Zealand Government 5 per cent. Stock, 1946, by reason of composition under the provisions of s. 114 of the said Act) were produced to the Commissioners each stamped with ad valorem "voluntary disposition" duty under s. 74 of the Finance (1909–10) Act, 1910, on the respective values of the stocks transferred. The other investments referred to in the first schedule of the settlement —namely, the first six mentioned in that schedule, were on or about March 21, 1928, transferred to the trustees of the settlement by the settlor acting by the said Albert Edward Ansell, the appellant, as his receiver under the provisions of the said order. These transfers, the liability of which to ad valorem "voluntary disposition" duty under s. 74 of the Finance (1909–10) Act, 1910, was not disputed by the appellant, were each stamped with the duty of 10*s.* only, and, the appellant being unable to produce them to enable further stamp duty to be impressed thereon, the Commissioners were willing at the request and to meet the convenience of the appellant to assess on the settlement the ad valorem "voluntary disposition" duty to which these transfers were liable.

The Commissioners were of opinion that the settlement presented for adjudication was chargeable as a conveyance or transfer operating as a voluntary disposition inter vivos under s. 74 of the Finance (1909–10) Act, 1910, at the rate of 10*s.* per 50*l.* of the value of the policies of life assurance which were assigned by clause 6 of the deed (which was not disputed), that either the settlement or the transfers were liable to similar duty in respect of the first six investments mentioned in the first schedule to the settlement (which was

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not disputed), and that the settlement (in addition to the fixed duty of 10*s.*, which was not disputed) was also chargeable under the head "SETTLEMENT" in the First Schedule to the Stamp Act, 1891, with ad valorem duty at the rate of 5*s.* per 100*l.* or any fractional part of 100*l.* of the value of the 13,000*l.* 4 per cent. Victory Bonds, the 2840*l.* 15*s.* 3½ per cent. Conversion Stock and the 20,882*l.* 1*s.* 6*d.* 4½ per cent. Conversion Stock, which last duty was disputed.

The actual assessment by the Commissioners of the duty on the settlement was as follows :—

(1.) Ad valorem "voluntary disposition" duty under s. 74 of the Finance (1909–10) Act, 1910, at the rate of 10*s.* per 50*l.* on 407,715*l.* 10*s.*, the value of :—

	£	*s.*	*d.*
13 100*l.* 4½ per cent. debentures of Ansell's Brewery, Ld.	1,131	0	0
3442 5*l.* preference shares of Ansell's Brewery, Ld.	16,349	10	0
37,500 5*l.* ordinary shares of Ansell's Brewery, Ld.	375,000	0	0
5 shares of 100*l.* each of the Droitwich Canal Navigation	480	0	0
20 shares of 5*l.* each of the Birmingham Crematorium Company, Ld.	40	0	0
2 shares of 10*l.* each of the Red Lion and Waverley Hotels Company, Ld.	20	0	0
Policies of life assurance	14,695	0	0
	£407,715	10	0

(The above did not include the value of any of the stocks or marketable securities standing in the name of and transferred by the Accountant-General as aforesaid.)

Duty, 4077*l.* 10*s.* (not disputed).

(2.) Ad valorem "settlement" duty at 5*s.* per 100*l.* or any fractional part of 100*l.* of 34,576*l.* the agreed value at average market prices of the day of the 13,000*l.* 4 per cent.

Victory Bonds, 2840*l.* 15*s.* 3½ per cent. Conversion Stock and 20,882*l.* 1*s.* 6*d.* 4 per cent. Conversion Stock.

Duty, 86*l.* 10*s.*,

and (3.) for the declaration of trust of the other stocks the fixed duty of 10*s.* (not disputed).

No objection was taken by the appellant to the assessments of duty other than the assessment of the ad valorem "settlement" duty on the value of the Victory Bonds and Conversion Stock, but he contended that (by reason of the provisions of s. 74, sub-s. 4, of the Finance (1909–10) Act, 1910, read with para. 1 of the General Exemptions from all Stamp Duties in the First Schedule to the Stamp Act, 1891) neither such settlement duty nor any other ad valorem duty in respect of the value of the Victory Bonds and Conversion Stock was chargeable on the settlement, and that the settlement was liable to the duties of 4077*l.* 10*s.* and 10*s.* only.

The question for the opinion of the Court was :—

(1.) Whether in addition to the 4077*l.* 10*s.* and 10*s.* the settlement was liable to ad valorem "settlement" duty as assessed by the Commissioners on the value of the Victory Bonds and Conversion Stock.

(2.) If not, to what duty it was liable.

Konstam K.C. and *Hildesley* for the appellant. This settlement admittedly operates as a voluntary disposition inter vivos, and therefore under s. 74, sub-s. 1, of the Finance (1909–10) Act, 1910, it is chargeable with the like stamp duty as if it were a conveyance or transfer on sale upon the value of the property conveyed or transferred. The question in this case is whether settlement duty is chargeable upon the English Government stocks which are included in the settlement. Those stocks are exempt from duty upon transfer under para. 1 of the General Exemptions from all Stamp Duties in the First Schedule to the Stamp Act, 1891. Sub-s. 4 of s. 74 of the Finance (1909–10) Act, 1910, provides that "where any instrument is chargeable with duty both as a conveyance or transfer under this section and as a settlement under the heading

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'SETTLEMENT' in the First Schedule to the principal Act, the instrument shall be charged with duty as a conveyance or transfer under this section, but not as a settlement under the principal Act." The fact that an instrument is a settlement of two classes of stocks does not enable it to be split up so as to make the stocks chargeable with different duties. Sect. 4 (*a*) of the Stamp Act, 1891, which provides that "an instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the matters," has no application to the present case, because the words "separate and distinct matters" in that section refer to separate transactions and not to the separate things transferred by the same instrument, and there are no separate and distinct matters charged in this case. But for s. 74 of the Act of 1910 there would have been no transfer duty chargeable in respect of the settlement, but merely settlement duty. Legislature substituted transfer duty for the settlement duty, and English Government stocks are exempt from transfer duty. It is clear that an instrument cannot be split up so as to apply different tax considerations to the various things of value to which it relates: see *Wills* v. *Bridge* (1); *Freeman* v. *Commissioners of Inland Revenue*. (2) The settlement was an instrument of transfer of all the things included in the schedules to the settlement. The fact that separate transfers were required in order to implement the settlement and to comply with the requirements of the Companies Acts does not prevent the settlement operating as a transfer. In *Davis* v. *Williams* (3) an agreement by several for a subscription to one common fund was held though several as to each subscriber to only require one stamp. In the same manner also in *Doe* d. *Croft* v. *Tidbury* (4) it was held that as there was a community of interest in the subject-matter of the conveyance in all the conveying parties, one stamp only was necessary. In *Reversionary Interest Society*, v. *Commissioners of Inland*

(1) (1849) 4 Ex. 193.
(2) (1871) L. R. 6 Ex. 101.
(3) (1811) 13 East, 232.
(4) (1854) 14 C. B. 304.

Revenue (1) a statutory declaration for the purpose of carrying through a transaction was sworn to, as to the whole of it by one person, and as to part of it by another person, and it was held that the document constituted only one declaration, and that it was not a declaration as to two distinct matters within s. 4 (*a*) of the Stamp Act, 1891.

J. H. Stamp (*Sir Thomas Inskip A.-G.* with him) for the Commissioners of Inland Revenue. The question in the present case is whether there was one transaction or more than one transaction. The cases that have been relied upon on behalf of the appellant are all cases in which the Courts held that they were dealing with one transaction. Where the same tax consideration applies to a transaction that transaction is not split up into separate parts. But if different parts of a transaction are subject to different tax considerations the transaction is split up and the distinct subject-matters are taxed separately. If a transaction is both an assignment and also a settlement it is split up, and in accordance with the provisions of s. 4 (*a*) of the Stamp Act, 1891, it is taxed both as an assignment and also as a settlement. A fortiori, if there is a settlement relating to different subject-matters to which different tax considerations apply, the settlement can be taxed both as a settlement as regards some subject-matters and as a transfer as regards others. The settlement in this case recites an intention to transfer, but it does not operate as a transfer except as regards the policies of life assurance; it is, however, a declaration of trust. In respect of the investments on which transfer duty is chargeable, settlement duty is not chargeable, but in respect of the Government stocks, which are exempt from the payment of transfer duty, settlement duty is chargeable. Sect. 106, sub-s. 1, of the Stamp Act, 1891, provides that "where several instruments are executed for effecting the settlement of the same property, and the ad valorem duty chargeable in respect of the settlement of the property exceeds ten shillings, one only of the instruments is to be charged with the ad valorem duty," and the

(1) (1906) 22 T. L. R. 740.

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Commissioners acted upon that provision in regard to the other investments. That section, however, only refers to the settlement of the "same property," and not to a settlement of different property in the same instrument, and therefore does not apply to the settlement of these Government stocks. Apart from s. 106 the appellant has no means of escaping the duty charged. If the contention of the appellant is correct it would only be necessary to make the settlement operate as a conveyance of a small policy of life assurance to enable a very large amount of Government stock, also included in the settlement, to escape payment of settlement duty.

Konstam K.C. in reply. If a settlement were made by which a small policy of life assurance was conveyed with the object of enabling a large amount of Government stock, which was also included in the settlement, to escape payment of settlement duty, the transaction would be merely colourable.

ROWLATT J. The document which I have before me in this case deals with subject-matters which can be divided into three classes. In the first place it deals with some policies of life assurance, and this document transfers those to trustees and declares the trusts and makes a settlement of them. Secondly, it deals with some investments other than Government securities. With regard to those investments this document ex facie only declares the trusts and constitutes a settlement; there have to be formal transfers which transfer the legal title to the trustees. Now as regards those the Commissioners do not seek to say that any advantage accrues to the Revenue by reason of there being transfers outside this document. They only ask for one ad valorem duty as on a conveyance or transfer; in effect they treat this document as if it were the transfer of the securities, which are in fact transferred by another form of deed. I think Mr. Konstam is entitled to the benefit of that, and to say that to all intents and purposes he can look at this document as a transfer of these securities. Of course, strictly speaking, it is not.

Then thirdly, the document declares the trusts of some Government securities, which also have to be transferred by a separate document. Now the point is this. Government securities do not attract any duty on a transfer, whether it is in this document or the other document; they only attract settlement stamp duty. Mr. Konstam's argument is that under sub-s. 4 of s. 74 of the Finance (1909–10) Act, 1910, which made voluntary dispositions inter vivos liable to transfer duty, the instrument is chargeable only with transfer duty in respect of these Government stocks, and that as they are not liable to transfer duty they are not liable to any duty at all.

The short answer to this contention, in my judgment, is that this deed, in so far as it concerns these Government stocks, deals with them as a distinct matter, just as if it was a separate deed; there is no difference at all, because they are included in the same deed with other stocks. I think the case comes within s. 4 of the Stamp Act, 1891. If one turns to s. 4 the distinct matters there must be distinct matters for the purposes of the Stamp Act. If two different classes of property are being transferred by the same words of assignment in the same document, and those two different classes of property in the same document are different from the point of view of the Stamp Act and taxation, it seems to me in common sense that they must be distinct matters. The contrary view would lead to most unreasonable results, because, as I pointed out to Mr. Konstam, by the inclusion in a settlement which dealt with a quantity of Government stock, of a small subject-matter in respect of which both conveyance and transfer duty and settlement duty would be chargeable, on his contention the whole document would be brought within the purview of s. 74, sub-s. 4, of the Act of 1910 by reason of the accident that it is one document. Mr. Konstam said that if that was done it could be regarded as a colourable transaction or something to that effect. I do not quite know what that means. Either the document would be described as within s. 74, sub-s. 4, or it would not; there is no question of colour that comes in at all if

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the transaction was a real transaction and not a sham one. Then Mr. Konstam says that there is express provision to the contrary within the meaning of s. 4 of the Stamp Act, 1891, in sub-s. 4 of s. 74 of the Act of 1910. I do not think so in the least. His point is that this document, because it is one document, is to be treated as falling, the whole of it, within sub-s. 4 of s. 74. That sub-section does not deal with the question of separate and distinct matters at all. It really says that when there is one matter and it is taxable in two aspects then one aspect is to prevail over the other aspect. It does not bring together or deal with separate and distinct matters at all.

In my judgment when the case is appreciated it is an extremely simple one. I have not the least doubt that the decision of the Commissioners was right, and therefore the appeal must be dismissed with costs.

Appeal dismissed.
Judgment for Crown.

Solicitors for appellant: *Stow, Preston & Lyttelton, for Ansell & Sherwin, Birmingham.*

Solicitor for Crown: *Solicitor for Inland Revenue.*

R. F. S.

THE KING *v.* MINISTER OF HEALTH.

Ex parte DAVIS.

K. B. D. 1928 *Dec.* 18.

C. A. 1929 *Feb.* 27, 28; *March* 13.

Local Government—Improvement Scheme—Unhealthy Area—Area to be cleared by local Authority—Power taken to sell or lease cleared Area unconditionally—Prohibition—Housing Act, 1925 (15 *Geo.* 5, *c.* 14), *Part II.*

An improvement scheme purporting to be made under the provisions of the Housing Act, 1925, after providing for the acquisition and clearing of an unhealthy area, proceeded to empower the local authority to sell, lease or otherwise dispose of, as they thought fit, the cleared area or to appropriate or use it for any purpose approved by the Minister of Health. The scheme further provided that if the Minister so required, the local authority should provide a number of dwellings, not exceeding 72, suitable for accommodation of persons of the working classes, on a site either within or without the area, according to a scheme to be approved by the Minister. The scheme had been presented to the Minister with a petition for its confirmation:—

Held by the Divisional Court that a rule nisi for a writ of prohibition prohibiting the Minister from proceeding further in the matter of the scheme must be made absolute on the grounds (1.) that the Act did not authorize an improvement scheme containing an unrestricted power to sell or lease the cleared area, so that the Minister had no jurisdiction to consider the scheme; and (2.) that prohibition to him lay at this stage, inasmuch as by s. 40, sub-s. 5, of the Act, his order of confirmation, when made, would have effect as if enacted in the Act.

On appeal:—

Held, by the Court of Appeal (affirming the Divisional Court's decision), that in order to be a valid improvement scheme within Part II. of the Act, a scheme must, besides providing for the acquisition and clearance of an area, contain particulars of the proposed development of the area, and not confer on the local authority an unrestricted power to sell or lease the cleared area.

Per Greer L.J.: A valid improvement scheme within Part II. of the Act must comply with the definition of an improvement scheme in s. 35, sub-s. 1, of the Act, and be therefore "a scheme for the rearrangement and reconstruction of the streets and houses in the area or some of such streets or houses."

RULE NISI for prohibition.

A scheme which purported to be made under the provisions of s. 35 of the Housing Act, 1925 (15 Geo. 5, c. 14), known as the Derby (River Street, Duke Street, Bridge Gate and Darley Lane Area) Improvement (No. 2) Scheme, 1928, dealing with a congested area, had been prepared by the council of the county borough of Derby under Part II. of

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the above Act, which deals with "Improvement and Reconstruction Schemes," (1) and a petition had been presented to the Minister of Health, under s. 40, sub-s. 1 (1), praying that an order be made confirming the scheme.

(1) Housing Act, 1925 (15 Geo. 5, c. 14), Part II., s. 35, sub-s. 1: "Where an official representation is made to a local authority as respects any area in the district of the authority either (*a*) that any houses, courts, or alleys within the area are unfit for human habitation, or (*b*) that the narrowness, closeness, and bad arrangement, or the bad condition of the streets and houses or groups of houses within the area, or the want of light, air, ventilation, or proper conveniences, or any other sanitary defects, or one or more of such causes, are dangerous or injurious to the health of the inhabitants either of the buildings in the area or of the neighbouring buildings; and that the most satisfactory method of dealing with the evils connected with such houses, courts, or alleys, and the sanitary defects in the area, is a scheme (hereinafter referred to as an improvement scheme) for the rearrangement and reconstruction of the streets and houses within the area, or of some of such streets or houses, the local authority shall take such representation into their consideration, and if satisfied of the truth thereof, and of the sufficiency of their resources, shall pass a resolution to the effect that the area is an unhealthy area and that an improvement scheme ought to be made in respect of the area, and after passing such a resolution they shall forthwith proceed to make a scheme for the improvement of the area."

Sect. 38, sub-s. 1: "An improvement . . . . scheme . . . . (*c*) shall provide for proper sanitary arrangements."

Sub-s. 4: "Where by or in consequence of an improvement or reconstruction scheme persons of the working classes in the area affected by the scheme will be displaced, the scheme shall, if the Minister so requires (but it shall not otherwise be obligatory on the local authority so to frame their scheme), provide for the accommodation of such number of such persons so displaced in suitable dwellings to be erected in such place or places either within or without the limits of the same area as the Minister on a report made by the officer conducting the local inquiry hereinafter mentioned may require."

Sect. 39 provides for the publication of an advertisement of the scheme in a newspaper and service of notices on owners of lands proposed to be taken.

Sect. 40, sub-s. 1: "Upon compliance with the foregoing provisions with respect to the publication of an advertisement and the service of notices, the local authority shall present a petition to the Minister praying that an order may be made confirming such scheme."

By sub-s. 2 a copy of the scheme is to accompany the petition.

Sub-s. 3: "The Minister after considering the petition may cause a local inquiry to be held, and, if satisfied on the report thereon that the circumstances are such as to justify the making of the scheme and that the carrying into effect of the scheme either absolutely, or subject to conditions or modifications, would be beneficial to the health of the inhabitants of the area in question or of the neighbouring dwelling-houses,

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The scheme provided for the compulsory acquisition by the council of the county borough of Derby of certain lands included in the scheme, and provided (inter alia): "After obtaining possession of the lands included in the area the council shall, except so far as the Minister shall otherwise direct, cause all the buildings to be demolished and the sites to be cleared. The whole of the cleared area shall be sold, leased or otherwise disposed of as the council may think fit, or may be appropriated or used by the corporation for any purpose approved by the Minister of Health, provided that on any such appropriation or user the value of the land appropriated or a proper payment as the case may be in respect of the use of the land shall be credited to the cost of the scheme."

The scheme further provided: "If the Minister of Health so requires, the council will provide a number of dwellings, not exceeding 72, suitable for the accommodation of persons of the working classes on a site either within or without the limits of the area, according to a scheme to be approved by the Minister." The prosecutor, Mr. William Davis, obtained the rule prohibiting the Minister of Health from proceeding further in the matter of the scheme on the ground that the proposed scheme was not a scheme within the meaning of the Act, and that, consequently, the Minister had no jurisdiction to consider it.

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may by order confirm the scheme with or without . . . . conditions or modifications . . . ."

Sub-s. 5: "The order of the Minister when made shall have effect as if enacted in this Act."

By s. 42, sub-s. 1, on an order being made by the Minister it becomes the duty of the local authority to purchase land required for the scheme.

Sub-s. 2: "The local authority may sell or let all or any part of the area comprised in the scheme to any purchasers or lessees for the purpose, and under the condition, that such purchasers or lessees will, as respects the land so purchased by or leased to them, carry the scheme into execution . . . ."

Sect. 46, sub-s. 1, makes provision for compensation, and continues: "Provided that, if in the opinion of the Minister it is necessary that provision should be made by the scheme for the re-housing of persons of the working classes on the land or part thereof when cleared, or that the land or a part thereof when cleared should be laid out as an open space," then compensation shall be payable on a certain basis.

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Sir T. Inskip A.-G. and *Bowstead* showed cause. It is said that this is not a scheme for "the rearrangement and reconstruction of the streets and houses" in the area within the meaning of s. 35, sub-s. 1, of the Housing Act, 1925. (1) But the inference sought to be drawn from the provisions of s. 38, sub-s. 1 (*c*) (1), which enacts that a scheme must provide for proper sanitary arrangements, that the Act directs that houses should be erected is a rather far-fetched one, for although a scheme did not contemplate the erection of houses it might still be desirable to have sanitary arrangements in view of the possibility of a factory or other commercial building being erected on the site. On the other hand it is not a far fetched inference to draw from the language of s. 40, sub-s. 3 (1), that in dealing with a congested area the scheme may provide that the area should be cleared and kept vacant, for—and it has been so provided in other cases—the best way of carrying out the objects of the Act may be to create a lung for the neighbourhood. One way of rearranging houses is to arrange them with larger spaces between each. Sect. 38, sub-s. 4 (1), makes provision for the housing of members of the working classes displaced by the proposed scheme, and it seems plain from that sub-section that they can be rehoused outside the area, so there would be no necessity for houses for them inside the area. Something must be done with the land, and it is submitted that it may be sold or leased or used by the authority for their own purposes. It is not necessary to show that the scheme is a good one; it is sufficient to show that it is a scheme ready to go forward for the Minister's consideration.

Scholefield K.C. and *H. A. Hill* in support. This is not a scheme within the Act of 1925, therefore the Minister has no jurisdiction to consider it. It is not contended that this space could not be left as an open space for the purpose of ventilation. But that is not what the local authority is proposing to do with it. They are buying at cleared values small plots of land in the heart of Derby with the avowed object of selling them for the best prices they can obtain.

(1) Ante p. 620, note (1).

The Legislature cannot have contemplated that. In *Barlow* v. *Ross* (1) the Artisans' and Labourers' Dwellings Improvement Act, 1875 (38 & 39 Vict. c. 36), was considered, which was an Act dealing with similar matters to those dealt with in the Housing Act, 1925. Lord Esher M.R. said (2): "Thus the object of the Act is that, where there are the inconveniences and dangers pointed out in the preamble [viz., congestion, absence of ventilation, etc.], houses should be pulled down and reconstructed. Reconstruction is therefore one of the objects of the Act." Under the provisions of the present Act it may be, as already conceded, though it is not necessary to consider the question, that the reconstruction might take the form of the creation of an open space as a lung "for the improvement of the area": s. 35, sub-s. 1. (3)) But nowhere does the Act confer a power to sell for any purpose. It is true that in s. 42, sub-s. 2 (3), a limited power to sell or let is given to the authority, but to purchasers and lessees only who will undertake to carry the scheme into execution. The ultimate object of the scheme being to sell the whole area unconditionally, the local authority could not, under this scheme, carry out the object of the Act—namely, rearrangement and reconstruction of the unhealthy area. In fact the scheme is too vague as to what is to be done thereunder to enable any one to decide what line he is to take with reference to it. It may be asked why it should be assumed that the Minister will authorize something he has no power to authorize. But he may take the view that he has the power and ought to exercise it, and may confirm the scheme as it stands, and the applicants are not bound to wait and to run the risk of what he may ultimately order; and see the observations of Atkin L.J. in *Rex* v. *Electricity Commissioners*. (4) And the applicants are obliged to act at once, because by s. 40, sub-s. 5 (3), the order of the Minister confirming the scheme is to take effect as if enacted in the Act.

Sir T. Inskip A.-G. replied on the cases cited.

(1) (1890) 24 Q. B. D. 381.
(2) Ibid. 390.
(3) Ante p. 620, note (1).
(4) [1924] 1 K. B. 171, 206.

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LORD HEWART C.J. This is a rule nisi for a writ of prohibition directed to the Minister of Health, to prohibit him from proceeding further in the matter of an order to confirm a certain scheme cited as the Derby (River Street, Duke Street, Bridge Gate and Darley Lane Area) Improvement (No. 2) Scheme, 1928, upon the ground that the Minister had no power to order an inquiry into the scheme, and had no jurisdiction further to consider or to confirm the scheme. In the course of the argument the attention of the Court has been directed to a considerable number of sections contained in Part II. of the Housing Act, 1925, which is the part of the Act concerned with improvement and reconstruction schemes. It may well be that some of those sections are not quite easy to construe, but one matter of great importance seems clearly to emerge from this interesting and protracted discussion. The scheme which is under consideration, after providing for the taking of certain lands and the demolition of the buildings upon those lands and the clearing of the sites, contains this paragraph: "The whole of the cleared area shall be sold, leased or otherwise disposed of as the council may think fit, or may be appropriated or used by the corporation for any purpose approved by the Minister of Health." The substance of the argument which is made in support of the rule may be expressed rather more baldly and crudely than it has been expressed by the learned counsel, for as I understand it the real substance of the complaint is that under the name, and the agreeable name, of an improvement scheme, this particular council is minded to acquire a slice of very valuable land in the heart of the city of Derby, not for any purpose of rearrangement or reconstruction, but for the purpose, if and when the local authority thinks fit, of resale, and, of course, of resale at the highest obtainable price. The argument is that there is nothing clear in this scheme, except up to the point where the land has been acquired and the site has been cleared. After that stage is reached, it is contended that all is left vague, and the local authority is in terms seeking to take to itself under the scheme the power to sell, to lease or

otherwise to dispose of the whole cleared area, as the authority may think fit. One naturally asks whether the statute contemplates any such power as that. It is suggested that by implication such a power must be latent in the Act, partly because of the provisions under s. 38, sub-s. 4 (1), with reference to the provision of alternative accommodation for persons of the working classes, and partly because of the terms of the proviso to s. 46, sub-s. 1. (1) In my opinion if Parliament had really intended that the local authority under such a scheme should have power to sell, to lease, or otherwise to dispose of, as it might think fit, the whole of the cleared area, that power would have been expressed in unambiguous terms. Then it is said that under s. 40, sub-s. 3 (1), of the Act the Minister has power to confirm a scheme with or without such conditions or modifications as may appear to him to be right and proper; and we are told that in fact he has never confirmed a scheme containing this power of sale and lease in this unqualified way, but has imported into it words requiring his approval. Put affirmatively, that amounts to a statement that subject to his approval there have been schemes authorized under this Act which do empower a local authority to sell, to lease or otherwise to dispose of the cleared area. The importance of that statement I think is this: When we are told that under the Act the Minister has the power we cannot resist the inference that if he has it, or believes he has it, he may use it; and I think, therefore, we ought to approach the consideration of this rule with the reflection that it is possible that this scheme may be approved as it is, or may be approved with some limiting words of the kind which have been indicated.

In my opinion it is incorrect to say that the Minister under this Act has the power to authorize the sale or lease of the cleared area. There is, indeed, when one looks at s. 42, sub-s. 2, of the Act (1), in that part of the Act, namely, Part II., which has to do with the execution of improvement and reconstruction schemes, a precise and limited power conferred

(1) Ante p. 620, note (1).

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on the local authority to sell or let all or any part of the area comprised in the scheme. But it is a power guarded by special conditions and limitations. The selling or the letting is to be for the purpose of enabling the purchasers or the lessees to carry the scheme into execution and not otherwise. In other words in the Act there is a limited power to sell or to let, while the purpose of the scheme before us is to confer on the local authority a power to sell, or to let, freed from those or any limitations. I cannot help thinking that that is quite wrong. There are other matters in this case to be considered, as for example the argument which has been urged, that if the scheme is precise up to a point and vague after that point, it is difficult for persons interested to know how they are to deal with it, by what arguments they are to grapple with it, by what evidence they are to seek to meet it. Here what is offered to the public is a scheme, clear up to a point, perfectly vague after that point and yet, notwithstanding its vagueness, a scheme that indicates the bestowal of a power which seems clearly to be beyond the provisions of this Act, whether one looks to the powers of the local authority or to the powers of the Minister himself.

The question then arises: Is this a proper case for prohibition? It is common ground that, if this scheme should be approved or confirmed by the Minister in a form going beyond what the Act renders lawful, there is no remedy and there is no redress. On the contrary by s. 40, sub-s. 5, it is in terms provided that: "The order of the Minister when made shall have effect as if enacted in this Act." That being so, I think that light is thrown upon the present question by the decision of the Court of Appeal in the case of *Rex* v. *Electricity Commissioners* (1), where Atkin L.J. (as he then was) said this: "The question now arises whether the persons interested are entitled to the remedy which they now claim in order to put a stop to the unauthorised proceedings of the Commissioners. The matter comes before us upon rules for writs of prohibition and certiorari which have been discharged by the Divisional Court. Both writs

(1) [1924] 1 K. B. 171, 204.

are of great antiquity, forming part of the process by which the King's Courts restrained courts of inferior jurisdiction from exceeding their powers. Prohibition restrains the tribunal from proceeding further in excess of jurisdiction; certiorari requires the record or the order of the court to be sent up to the King's Bench Division, to have its legality inquired into, and, if necessary, to have the order quashed. It is to be noted that both writs deal with questions of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a Court of Justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognised as, Courts of Justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs." The learned Lord Justice proceeded to give a series of typical examples and added (1): "I can see no difference in principle between certiorari and prohibition, except that the latter may be invoked at an earlier stage. If the proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters which would result in its final decision being subject to being brought up and quashed on certiorari, I think that prohibition will lie to restrain it from so exceeding its jurisdiction." There are other passages to the same effect. Younger L.J. (as he then was) said (2), having made some observations of a similar kind: "If that be the true view of the statute the interference of the Court in such a case as this, and at this stage, so far from being even in the most diluted sense of the words a challenge to its supremacy, will be an assistance to Parliament." Here, to apply that kind of canon to the present case, this matter had reached its last stage but one; the last stage, if it were to be reached, would be the stage in which the order would have assumed all the authority

(1) [1924] 1 K. B. 206. (2) [1924] 1 K. B. 213.

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of an Act of Parliament. If check there is to be, it must be imposed now. We are told that this power, which in my opinion does not exist, does exist in the Minister; we are told that subject to a certain modification he has already in other cases exercised it. We ought to assume, therefore, that in this case, if nothing is done, he may exercise it again. It is said that another part of the scheme contemplates the provision by the council of a number of dwellings not exceeding 72 suitable for the accommodation of persons of the working classes on a site either within or without the limits of the area according to a scheme to be approved by the Minister. The argument is that if those dwellings were indeed erected in that number upon the area to be cleared, there would be little of that area left for any other purpose. But that course is to be taken only if the Minister of Health so requires, and one cannot exclude at least the possibility that in the circumstances of this case the Minister of Health might abstain from so requiring and might on the contrary, as the council contemplates, permit the sale, or the leasing, or the disposing otherwise of the whole of the cleared site. In those circumstances, without entering into other grounds which also in my opinion are well worthy of consideration, I think that this rule ought to be made absolute.

AVORY J. I am of the same opinion. In substance the question we have to determine is whether this scheme is an improvement scheme within s. 35 of the Housing Act, 1925. (1) In my view upon consideration of that section a local authority is only authorized to cause an improvement scheme to be made when they are satisfied that the representation made to them is well founded, not only that the houses within the area are unfit for human habitation, or that the narrowness and bad arrangement of the streets and houses are dangerous or injurious to the health of the inhabitants, but also they must be satisfied that the most satisfactory method of dealing with these evils is a scheme

(1) Ante p. 620, note (1).

for the rearrangement and reconstruction of the streets and houses within the area, or of some of such streets or houses. If that is the correct view of s. 35, then the question is: Is this a scheme for the rearrangement and reconstruction of the streets and houses within the area or of some of such streets or houses? In my view the provision in the scheme, that the whole of the cleared area shall be sold, leased or otherwise disposed of as the council may think fit, is incompatible with it being a scheme for the rearrangement and reconstruction of the streets and houses within the area. At first I was disposed to think that in this case we ought to assume that the Minister, upon being applied to for confirmation of this scheme, would disapprove of this clause and refuse to sanction the scheme with such a clause in it, but I am satisfied now, upon further consideration of the decision of the Court of Appeal in the case of *Rex* v. *Electricity Commissioners* (1), that we are bound in this case to assume the possibility that the Minister might approve this scheme as it now stands and might approve of this clause in it; and if we are to assume that possibility, then that decision is a clear authority that if we are of opinion that the scheme as it stands is ultra vires of the local authority we ought, at this stage, to interfere and prevent the parties from being put to any further expense in contesting the matter, even if they would have any opportunity of further contesting it.

I would only quote one other passage from the judgment in *Rex* v. *Electricity Commissioners* (2), which bears upon this point. Bankes L.J. said: "The first objection taken was that any application was premature, the matter being still only in its opening stage. The Commissioners, it was said, have decided nothing; they have merely published the scheme preparatory to holding the local inquiry thereon which they are directed by s. 5, sub-s. 4, of the Act of 1919 to hold before making any order. This objection may be a valid objection to the granting of a writ of certiorari, but as it is not necessary to decide the point I express no opinion upon it. With regard to prohibition, if the writ lies at all I do not think

(1) [1924] 1 K. B. 171. (2) [1924] 1 K. B. 189, 190.

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that the objection is a sound one. The point was raised in the case of *Byerley* v. *Windus*. (1) Bayley J. deals with it in this way. He says: 'And this brings me to the second question, whether the proceedings are in such a state in the court below as to warrant a prohibition *at present*'; and he proceeds: 'But when once it appears by the proceedings in the spiritual court, that the prescription, instead of being admitted, is disputed, and that the parties are in progress to bring its existence to trial, the courts of common law are not bound to wait till the parties have incurred the expense of *putting it in issue*, but the prohibition is grantable *at once*.'" Having come to the conclusion that this scheme as it stands might possibly be sanctioned by the Minister, and that if once sanctioned by him there is no remedy by which the validity of it could be tested, I have come to the conclusion that we ought to interfere at this stage and grant this writ of prohibition.

ACTON J. I agree.

Rule absolute.

W. L. L. B.

The Minister of Health appealed.

1929. Feb. 27. *Sir T. Inskip A.-G.* and *Bowstead* for the appellant. The rule ought to have been discharged. The Divisional Court has made the rule absolute apparently on the ground that an improvement scheme within the Housing Act ought by virtue of s. 35 to provide for building houses on the area to be cleared. Improvement schemes may however be made with a view (*a*) to clearing an area and building on it; (*b*) to clearing an area not suited for building, such as a marshy area, and keeping it as an open space; or (*c*) to clearing an area, and providing widened approaches and opening out an unhealthy area. This was clear from the provisions in Part II. of the Housing Act, 1925, and in particular from s. 38, sub-s. 4, and s. 46, sub-s. 1. The contention that a

(1) (1826) 5 B. & C. 1, 21.

proper scheme must provide for covering the cleared area reasonably with houses is contrary to s. 46, which provides for reduced compensation when provision is made in the scheme for rehousing the working classes or for laying out as an open space. If it was an integral part of every improvement scheme that there should be building, compensation at the higher rate would never be payable. Reading Part II. as a whole there must be power to dispose of surplus lands with the Minister's leave. The whole idea is to get rid of houses unfit for habitation, and it is not an essential part of a scheme to provide houses for working classes.

Again objection is also taken to the present scheme on the ground that it does not outline the mode in which the land taken is to be dealt with, but there must, it is submitted, be power to make a scheme under which the local authority may sell the land or use it for their own purposes. The scheme might provide for the land being kept as an open space.

[GREER L.J. The difficulty is that the scheme does not define the user even to that extent.]

That is the criticism which has been levelled at the scheme, but here it is proposed to sell or lease the land which accords with s. 42, sub-s. 2.

[LORD HANWORTH M.R. It will be said that this sub-section only authorizes selling or leasing on the condition that the purchasers or lessees carry the scheme into execution, and that there must be something in the scheme which is to be carried into execution.]

It all comes back to the question whether the Act requires a definite scheme for the use of the land subject to the modifications which may afterwards be imposed by the Minister. It would be putting an impossible burden on local authorities to require them to put forward a definite scheme for the use of the land before they knew what the Minister's requirements would be. It is contended that it is perfectly proper for a scheme to provide for the sale of the cleared ground or part of it. A scheme cannot cease to be a scheme because the local authority takes power to sell surplus land ;

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and if not, where is the line to be drawn? Can a sale be made of all the ground except sufficient for one or two houses? It may be that the scheme put forward here is not a good scheme, but such a scheme as the Minister would approve unaltered. But that is not a question for this Court, which has only to decide whether the proposed scheme is an improvement scheme within the Act. It is contended that a scheme need do no more than provide for acquiring and clearing, and that the provisions in the sections of the Act as to the uses that may be made of it are purely permissive.

H. A. Hill and *Naylor* for the respondent. An improvement scheme must provide "for the rearrangement and reconstruction of the streets and houses within the area, or some of such streets and houses": s. 35, sub-s. 1. It is so that the section defines an improvement scheme, and words in a statute that are clear and unambiguous should be construed strictly: *Nuth* v. *Tamplin* (1); *Richards* v. *McBride*. (2) Persons whose property was to be acquired compulsorily under statutory power were entitled to have the statute conferring the powers construed strictly. The powers conferred on local authorities by the Housing Act, 1925, Part II., were: (1.) to acquire property compulsorily: ss. 64, 106; (2.) to lay out and sewer the land: s. 38, sub-s. 1, and s. 42, sub-s. 4; (3.) to make provision for rehousing persons displaced if the Minister so requires: s. 38, sub-s. 4; (4.) to lay out the land as a building estate without making provision for persons displaced or for housing the working classes; and (5.) to provide shops, recreation grounds or other buildings in connection with houses erected. But whatever the scheme was to effect must be shown by it. Persons affected by the scheme, whether as property owners or ratepayers, were entitled to know the object of the scheme. Here the whole thing was left vague, and there was no scheme within the meaning of the Act. Persons whose property was taken were entitled to be heard at the inquiry: s. 41, sub-s. 1; and see s. 116, which applied certain sections of the Public Health Act. How could these persons know whether

(1) (1881) 8 Q. B. D. 247, 253. (2) (1881) 8 Q. B. D. 119, 123.

to support or oppose the scheme or have material for doing so, unless the scheme set out in terms what it was proposed to do with the land to be acquired? It is said that it is useless to know this, because the Minister has power to modify the scheme at a later stage, but it is necessary to distinguish between modifying and remaking a scheme. In the form of scheme proposed and sent out by the Ministry: see Lumley's Public Health, 9th ed., vol. ii., p. 2671, it is contemplated that the scheme will contain provisions as to the lay out of the area.

Again a clause in an improvement scheme conferring an unrestricted power of sale is ultra vires the local authority to insert or the Minister to confirm. There is no provision in the Act giving such an unlimited power. Sect. 42, sub-s. 2, allows a sale or leasing, but only subject to a liability in the purchasers or lessees to carry the scheme into execution. It is not a claim here to sell surplus land, but to sell the whole of the area comprised in the scheme.

Sir T. Inskip A.-G. in reply. It would be curious if Parliament, while permitting the demolition of houses when there was overcrowding, made it a condition that the site must be built upon again. The words "rearrangement and reconstruction" in s. 35, sub-s. 1, must, if construed strictly, mean that the same number of houses are to be kept on the site. It is submitted that it is sufficient if the scheme provides for clearing the site, but if the scheme must provide for the erection of houses that has been provided for in the scheme if the Minister should so require. It was suggested that a detailed scheme was necessary to enable persons concerned to decide whether to oppose the scheme. It must be remembered, however, that though the local authority might propose, it was the Minister who disposed, so that a scheme might be radically altered by the Minister. The Court ought not to hold that there was no scheme within the Act on the ground that it was too vague. The mere clearing of a site might be a very good slum clearance scheme.

Cur. adv. vult.

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March 13. LORD HANWORTH M.R. This is an appeal from an order dated December 18, 1928, made by the Divisional Court, making absolute an order nisi for a writ of prohibition, prohibiting the Minister of Health from proceeding further in the matter of an order confirming a certain scheme cited as "The Derby (River Street, Duke Street, Bridge Gate and Darley Lane Area) Improvement (No. II.) Scheme, 1928," on the ground that it is not an improvement scheme within the meaning of the sections contained in Part II. of the Housing Act, 1925. William Davis, whose property is affected by the scheme, after a public local inquiry had been held, applied for a prohibition to the Minister of Health prohibiting him from proceeding to confirm the scheme, and succeeded in obtaining the rule absolute to that end from the Divisional Court.

It is claimed by the mayor, aldermen and burgesses of the borough of Derby, who are the local authority for the district of the county borough, that the proposals made for the area above named are a good improvement scheme within the Act. They provide for the acquisition of certain lands in the area, and that after obtaining possession of them the council shall —except in so far as the Minister may otherwise direct—cause all the buildings to be demolished, and the sites to be cleared.

Then come two paragraphs as follows: "The whole of the cleared area shall be sold leased or otherwise disposed of as the council may think fit, or may be appropriated or used by the corporation for any purpose approved by the Minister of Health—provided that on any such appropriation or user, the value of the land appropriated, or a proper payment as the case may be in respect of the use of the land shall be credited towards the cost of the scheme.

If the Minister of Health so requires, the council will provide a number of dwellings not exceeding 72 suitable for the accommodation of persons of the working classes on a site either within or without the limits of the area, according to a scheme to be approved by the Minister."

Do these proposals embody a good improvement scheme within Part II. of the Housing Act, 1925? It is claimed

by the local authority that they do, although they provide for the clearance of the area only, and leave the disposal or use of the sites cleared to be determined at a later date.

In my judgment it is important to note the several and successive stages which the Act provides.

First. There must be an "official representation" made to the local authority. The nature of an official representation is found in s. 36. It is one that is made by the medical officer of health of the local authority on his own responsibility, or he may be moved by a justice of the peace, or any four Local Government electors in the district, to inspect, and make a report stating the facts of the case, and whether the area is in part or in whole an unhealthy area; and if he thinks proper to do so, he is to make a representation to his local authority.

The next stage is dealt with by s. 35, and is reached when such an official representation is made to the local authority. The representation may be that certain buildings are unfit for human habitation, or that the bad condition of the streets and houses or groups of houses in the area is dangerous or injurious to the health of the inhabitants.

Based upon the above premises, the representation must go on to state that the most satisfactory method of dealing with these evils is a scheme ("hereinafter referred to as an improvement scheme"). That is to say, one for the rearrangement and reconstruction of the streets and houses within the area, or of some of them.

Then the next stage is that the local authority are to take that representation into their consideration, and "if satisfied of the truth thereof, and of the sufficiency of their resources," they are to pass a resolution to the effect that the area is an unhealthy area, and "that an improvement scheme ought to be made in respect of the area, and after passing such a resolution they shall forthwith proceed to make a scheme for the improvement of the area."

Pausing at this point, it appears that the representation of the medical officer must indicate a possible scheme for the rearrangement and reconstruction of the streets and houses—

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of a general nature and without full practical details, which indeed a medical officer of health could not be expected to supply; but nevertheless a general scheme for the rearrangement and reconstruction of the streets and houses. The words in the sub-section appear to indicate that the proposals of the medical officer must indicate rearrangement and reconstruction, and cannot suggest demolition merely, without any kind of replacement or user at all.

The local authority, who "shall forthwith proceed to make a scheme for the improvement of the area," must take in hand the problem in a practical manner, if satisfied of the truth of the representation and of the sufficiency of their resources. But in my judgment the scheme for the "improvement of the area" is not different from the improvement scheme indicated by the medical officer in its aim and nature, though it must be worked out in detail according to the sufficiency of the resources of the local authority.

A further stage is reached under s. 38. That section gives the requisites for an improvement scheme. It is to be accompanied by maps, particulars and estimates, and allows a considerable flexibility to the proposals of the original resolution, subject to this, that the scheme "shall provide for proper sanitary arrangements." Those arrangements may be necessary whether houses and streets are built, or an area laid out for public enjoyment in any form, but are inappropriate to land, the user or disposal of which is wholly undetermined at the time when the particulars and estimates are given and made. Under s. 38 it is declared—somewhat inconsequently—that there is no obligation upon the local authority to frame their scheme so as to provide for the accommodation of the working classes displaced by it, though they are to provide such accommodation if required so to do by the Minister of Health.

The next stage is that under s. 39 notices are to be served upon persons whose lands are to be taken, and an advertisement published stating the fact that the scheme has been made, the limits of its area, and a place where a copy of the scheme can be seen. Sect. 40 provides for confirmation by

the Minister of the scheme in whole or in part absolutely, or subject to modification, and for the mode in which the land and houses are to be compulsorily acquired; and s. 42 lays upon the local authority the duty of carrying the scheme, when confirmed by the Minister, into execution.

In the execution of this duty thus laid upon them the local authority may sell or let all or any part of the area comprised in the scheme to other persons or purchasers, who will carry the scheme into execution; but for themselves, they are not to undertake the rebuilding of any premises, or the execution of any part of the scheme, unless the express approval of the Minister is obtained, though they may take down any or all the premises upon the area and clear the whole or part of it and "may lay out, form, pave, sewer, and complete streets upon the land purchased by them." It must be added that under s. 107 there is power for a local authority in connection with any scheme to provide housing accommodation, to provide and maintain recreation grounds.

After carefully surveying and examining the sections of Part II. of the Act, I can find no warrant for holding that a scheme for mere demolition without any proposal for replacement or reconstruction, or for substitution, is within the Act.

The power to hand over the area or any part of it by selling or letting to purchasers or lessees, under s. 42, is only granted upon the condition that such purchasers or lessees will carry the scheme into execution. As the Lord Chief Justice pointed out, the power is guarded by special conditions and limitations. At the present moment the council have not made any scheme which could be carried into execution, either for building, laying out as streets, or providing an open space.

The area is to be cleared and then "sold, leased, or otherwise disposed of as the council may think fit." No concrete proposal is to be submitted to the Minister. I cannot feel satisfied that the absence of such a scheme is justified, because any scheme propounded by the local authority can be modified by the Minister. It must not be supposed that the system of the Act will be worked unreasonably. The Minister

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may well need the assistance of the local authority in the first instance, even if he may on more general grounds require some modification of the proposals made to him. On the other hand, the Minister may, "if satisfied on the report thereon, that the circumstances are such as to justify the making of the scheme and that the carrying into effect of the scheme absolutely" would be beneficial, confirm the scheme as it is. Therefore it cannot be said that the duty of propounding or filling in the details of the scheme lies upon the Minister. Furthermore the compensation to be paid under s. 46 varies under the proviso, according as the land acquired is to be used not merely for rebuilding, but for rehousing of persons of the working classes or for laying out as an open site.

It seems of great importance that owners of property which is to be taken compulsorily under the scheme should be able to learn—from the copy of it that is to be seen at all reasonable hours, and which is to be accompanied by maps, particulars and estimates—what it is necessary for them to know, in order that they may be able to judge the measure of compensation payable to them, and to decide whether they will support or oppose the scheme, at the local inquiry, which we are told is almost invariably held before the Minister comes to his decision.

There is one further consideration. Under s. 37 provision is made for reconstruction schemes which are applicable to sites too small to be dealt with by an "improvement" scheme. In such schemes mere demolition is expressly permitted, and yet in improvement schemes no such word is to be found.

For these reasons I have come to the conclusion that an "improvement scheme" or "scheme for the improvement of the area" must contain provisions for the user of the land where it has been acquired, and that a proposal to acquire sites in an area, leaving open the question as to its subsequent user till after the Minister has given expression to the purpose for which it shall be used, is not a scheme that complies with the Act.

Further I cannot hold that the statement that the council will provide a number of dwellings, not exceeding 72, for the working classes, if the Minister of Health so requires, fills in the necessary requirements of the Act so as to make the proposals into a good scheme. The terms of this clause are hypothetical, and are in no sense definite objects of the scheme itself. They cannot be relied upon as giving a detailed purpose and user to the inchoate proposals.

The appeal must be dismissed with costs.

LAWRENCE L.J. The main question in this case is whether it is essential to the validity of an improvement scheme under Part II. of the Housing Act, 1925, that the scheme, besides providing for the acquisition and clearance of the area, should contain particulars of the intended development of such area or whether the statutory requirements are sufficiently complied with by a scheme which merely provides for the acquisition and clearance of the area and contains no such particulars. There is also a subsidiary question whether, if the statute requires that an improvement scheme should contain particulars of the intended development, the scheme in the present case sufficiently complies with such requirement.

The answers to these questions depend upon the true meaning and effect of the relevant provisions of Part II. of the Act, the draftsmanship of which leaves much to be desired. In my judgment, however, the Legislature has made it sufficiently plain that an improvement scheme, as the name implies, is a scheme which contains not merely a bare statement of the situation and extent of the land to be acquired and of the fact that the buildings on such land are to be demolished, but is a scheme which in addition to those particulars states the proposals for developing the land when cleared, so as to bring about the intended improvement of the area. This is what the Divisional Court has, in effect, decided, and I propose to state my reasons for coming to the conclusion that this decision is right.

The scheme in the present case purports to be an improvement scheme under Part II. of the Act, and provides, so far

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as material, for (1.) the compulsory acquisition of the land included in the scheme; (2.) the demolition of all the buildings on the land and the clearance of the sites of such buildings; and (3.) the sale, leasing or other disposal as the council might think fit of the whole of the cleared area, with a power of appropriation and user by the corporation for any purpose approved by the Minister. The scheme also contains a provision that, if the Minister so requires, the council will provide a number of dwellings, not exceeding 72, suitable for the accommodation of persons of the working classes on a site, either within or without the limits of the area, according to a scheme to be approved by the Minister.

It appears, therefore, that the scheme as framed contains no particulars as to the manner in which the local authority propose to lay out the land after its acquisition and clearance, and it becomes necessary to ascertain whether the provisions of the Act justify such omission.

Sect. 35 is important as showing how an improvement scheme originates and as containing the only definition of the expression "improvement scheme." First, there has to be an official representation to the local authority by the medical officer that as respects an area in the district certain specified evils exist, and that the most satisfactory method of dealing with those evils is a scheme "(hereinafter referred to as an improvement scheme)" for the rearrangement and reconstruction of the streets and houses in the area or some of such streets and houses. Secondly, the local authority have to take such official representation into consideration, and, if satisfied of its truth and of the sufficiency of their resources, they have to pass a resolution that the area is an unhealthy area, and that "an improvement scheme" ought to be made in respect of it. And, thirdly, forthwith after the passing of such a resolution, the local authority have to proceed to make "a scheme for the improvement of the area."

The place where the words "(hereinafter referred to as an improvement scheme)" are interposed is not happily chosen. At the point of interposition the section is speaking of a vague scheme for rearrangement and reconstruction suggested by

the medical officer, but from the subsequent provisions of the Act it is, in my opinion, plain that the expression "improvement scheme" is there used to denote the scheme for the improvement of the area made by the local authority, and that the words in question ought to be taken as having been inserted at the end of sub-s. 1 of this section, with the result that an improvement scheme, although based on the representation of the medical officer, is not necessarily confined to a scheme for the rearrangement and reconstruction of the existing streets and houses or some of such streets and houses.

Sect. 37 deals with reconstruction schemes, and has no direct bearing on the question to be determined on this appeal, but as counsel have referred to it as throwing some light on s. 46 (to which I will refer later) it is sufficient to mention that it confers (inter alia) a power on the local authority, in cases where a demolition order has been made under Part I. of the Act, to make a reconstruction scheme providing for the dedication of the site as a highway or open space if they think that course beneficial to the health of the inhabitants of the neighbouring houses.

Sect. 38 deals with the requisites for improvement schemes, and has, in my opinion, an important bearing on the question we have to decide. In the first place, an improvement scheme has to be accompanied by "maps, particulars and estimates." The legitimate inferences to be drawn from this provision are: (1.) that the scheme was intended to be accompanied by at least two maps, one of which should show the lands included in the scheme and the other the proposed lay-out of the cleared area, and possibly by a third map showing the site of the land outside the area (if any) proposed to be devoted to housing accommodation for displaced persons of the working classes; (2.) that the particulars were not intended to be confined to particulars of the method of demolishing the houses and clearing the site which would not greatly interest the Minister, but were to include all necessary information or explanation as to the intended development of the land; and (3.) that the estimates were intended to include not only the cost of acquiring and clearing

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the site, but also the cost of constructing any streets and erecting any buildings, the construction and erection of which the local authority intend to undertake themselves under the powers conferred upon them for that purpose by s. 42, sub-s. 4. In the next place, sub-s. 1 enacts (inter alia) first that the scheme may provide for the inclusion of any neighbouring lands necessary for making the scheme effective, which, in my opinion, clearly shows that the Act assumes that the scheme is not merely a scheme for clearing an unhealthy area of buildings, but is a scheme for the development of the cleared land, for the efficient carrying out of which development additional lands may be necessary; secondly, that the scheme is to provide for proper sanitary arrangements, which obligation can only have reference to the proposed development of the cleared site; and, thirdly, that the scheme may provide for any other matter deemed expedient with a view to the improvement of the area or the general efficiency of the scheme, here again pointing clearly to the fact that the scheme is one which deals with the intended development of the land. Incidentally, sub-s. 1, in my opinion, shows that an improvement scheme is not strictly confined to a scheme for the rearrangement and reconstruction of existing streets and houses as recommended by the medical officer, but may extend beyond such a scheme, and is in fact a scheme for the general improvement of the area.

Sub-ss. 4 and 5 of s. 38 do not, in my opinion, directly bear on the question we have to decide, but as counsel have referred us to them I think it right to point out that not only are they out of place, but sub-s. 4 cannot be made to fit into the general scheme of the Act at all. Sect. 38 is dealing with the requisites for a scheme which the local authority have to prepare with a view to its being submitted to the Minister for confirmation. The enactment that such a scheme should contain provisions, if required by the Minister but not otherwise, as to housing accommodation for displaced persons of the working class at such places as the Minister should require on a report by an officer conducting the local inquiry, which is only to be held after the scheme is submitted

to the Minister for confirmation, seems to me to be crediting the local authority with a power of foresight, which is nothing short of miraculous. Whatever may be the effect, if any, of these sub-sections, however, they in no way lend colour to the contention that the scheme need not be framed so as to show the proposed lay-out of the cleared area.

Sect. 39 provides for the publication of advertisements and the service of notices of the scheme as soon as it has been prepared. The direction to publish the scheme in a newspaper circulating in the district shows that the Legislature intended that the scheme should be brought to the notice not merely of the persons proposed to be expropriated, but also of the owners of the neighbouring lands whose property would be directly affected by the manner in which the land would subsequently be developed and of the ratepayers who would be interested in seeing that the local authority were not embarking upon some fanciful scheme of development which might unduly increase the rates. The intention in directing such advertisement is obviously to afford an opportunity to all persons affected by the scheme of making themselves acquainted with it and of presenting their views at the local inquiry, thus ensuring that any objections made by them would be brought before the Minister and taken into consideration by him in determining whether he should confirm the scheme with or without modifications, or at all.

The direction to serve a notice of the scheme on the owners whose lands are proposed to be taken for the purposes of the scheme and requiring them to state whether or not they dissent from the taking of their lands, in my opinion shows that the Legislature recognizes that both the owners whose lands are proposed to be taken, not on account of the insanitary or unhealthy conditions of the premises, but only for the purpose of making the scheme effective, and also the owners of lands the buildings on which are insanitary or unhealthy, are to have some voice on the question whether the scheme ought to be confirmed or not. Both classes of owners are substantially interested in knowing how it is

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proposed to develop the area in order to enable them to determine whether to assent to or dissent from the scheme. How could an owner of the former class tell whether it was necessary to include his land in the scheme at all unless he knew how it was proposed to lay out the area? Similarly, how could an owner of the latter class estimate the amount of the compensation he was likely to get in view of s. 46 or be able to judge what rehousing accommodation or open spaces the Minister was likely to require unless he knew what the intended development of the area was? It is no answer to these questions to say that such information would not be of much use to these owners, as the Minister might alter the whole scheme and so upset all their calculations. What the owners who are going to be expropriated want to know at this stage is not merely that the local authority have determined to take their lands, but also what the local authority intend to do with such lands, so that they may form some idea whether or not to oppose the scheme, and, if so, on what lines.

Sect. 40 deals with the confirmation by the Minister of the improvement scheme. The Minister may cause a local inquiry to be held, but as he is only empowered to confirm the scheme if he is satisfied on the report on such an inquiry as to the matters mentioned in the section, it follows that no improvement scheme can be confirmed by the Minister unless there has been a local inquiry at which all persons interested would presumably be given an opportunity of being heard. The order of the Minister confirming the scheme may incorporate the provisions of the Lands Clauses Acts, and is to have effect as if it were enacted by the Act. As the Attorney-General rightly said, this section shows that, although the local authority proposes, it is the Minister who disposes. There is apparently no limit placed on the powers of the Minister to impose conditions and modifications, except as to any addition to the land to be taken compulsorily. This wide power of confirmation, however, does not, in my opinion, justify the local authority in submitting a scheme which does not comply with the statutory requirements of an

improvement scheme, nor does it empower the Minister to consider such a scheme.

Sect. 42 imposes on the local authority the duty of carrying out the scheme after it has been confirmed by the Minister, and sub-s. 2 empowers the local authority after such confirmation to sell or let the whole or any part of the area for the purpose and on the condition that the purchasers or lessees will carry the scheme into execution. This limited power of sale and leasing conferred upon the local authority, although not necessarily inconsistent with the Attorney-General's contention (as it includes a power to sell or let before the buildings are demolished and the site cleared), yet, as pointed out by the Lord Chief Justice, tends to show that the Legislature never contemplated that a scheme might provide for the unconditional sale and disposal of the area as the local authority might think fit. Sub-s. 4, in my opinion, tends more strongly in the same direction. By this sub-section the local authority are forbidden, without the approval of the Minister, to undertake the rebuilding of any premises or the execution of the scheme, except the clearance of the area and the construction of streets. This enactment, in my opinion, shows that the Legislature assumed that the scheme would extend beyond the mere clearance of the area and would deal with the intended development of the area, at all events, so far as the construction of streets and any rebuilding of existing houses was concerned.

The only other section to which I need refer is s. 46, which provides for the compensation payable for the lands acquired compulsorily. As regards land taken on account of the insanitary or unhealthy condition of the buildings on it, the value is to be taken on the basis of its value as a cleared site available for development, but if in the opinion of the Minister it is necessary that provision should be made "by the scheme" for rehousing the working classes on the land or on some part of it, or that the land or some part of it should be laid out as an open space, all the owners of land included in the scheme, other than the owners whose lands are taken only for the purpose of making the scheme effective, are to

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receive a reduced compensation to be calculated as therein mentioned. The proviso to sub-s. 1 is not happily worded. Like sub-s. 4 of s. 38, it seems to contemplate that the Minister has some voice in the framing of the scheme, and could express his opinion as to what was to be contained in it as regards the provision of housing accommodation for the working classes. But assuming that it means that if the Minister on confirming the scheme were minded to impose the condition that the land or part of it should be devoted to rehousing the working classes or be laid out as an open space, it still leaves open the question whether, if the local authority were to frame a scheme providing for the necessary rehousing accommodation and for any proper open spaces without having obtained any opinion from the Minister, and the latter were to confirm the scheme without expressing any such opinion as is contemplated by this proviso, the full or the reduced compensation would become payable.

The Attorney-General argued the case on the footing that only the reduced compensation would in such a case become payable, and that an owner would be better off if no particulars of the lay-out were contained in the scheme, as the only result of disclosing such lay-out might be that the owners would suffer by becoming entitled only to the reduced compensation.

If the true construction be as assumed by the Attorney-General, there is some force in that argument. On the other hand, even on that construction, it is of importance to the owner to know what the intention of the local authority as to rehousing and open spaces within and without the area is, so as to be able to judge how much of the land within the area the Minister is likely to require to be laid out for rehousing and open spaces, and to see that if the scheme proposes to provide housing accommodation off the land, that such accommodation is reasonably sufficient. If, on the other hand, the reduced compensation only becomes payable if in the opinion of the Minister the scheme does not provide sufficiently for the rehousing and open spaces, then it is of still greater importance to the owner to see that the lay-out

provides sufficiently for these purposes. Moreover, it has to be remembered that under the scheme the landowner is to be expropriated, and that he is entitled to insist on a strict observance of all the statutory requirements. The amount of compensation he is to receive is not everything. Until he knows what the local authority is proposing to do with the property he has no means of judging of the attitude which it would suit him best to take up at the local inquiry or of the likelihood of the Minister making any modifications or conditions which might affect him.

Having regard to the provisions in Part II. of the Act as a whole, I have come to the conclusion that the Legislature did not intend to confer upon local authorities the power compulsorily to acquire large areas of land in towns on the representation of their medical officer, and then, after having cleared such areas, to deal with the land so acquired at their own will and pleasure.

There remains the subsidiary question. It is contended that the provision that, if the Minister so required, the council would provide not exceeding 72 dwelling-houses for the working classes within or without the area, is a sufficient compliance with the statutory obligation of providing in the improvement scheme for the proposed development of the land. In my opinion there is no substance in this contention. A mere statement in the scheme to the effect that if the Minister, as a condition of confirming the scheme, should require some matter to be dealt with which is not contained in the scheme, the local authority would submit for his approval a further scheme dealing with the matter, is not only a futile provision, as the Minister could impose that condition without any such provision, but does not in any way comply with what I conceive to be the statutory requirements as regards stating the intended development of the cleared area in the improvement scheme.

For the reasons stated I am of opinion that the decision of the Divisional Court was right, and that this appeal ought to be dismissed with costs.

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GREER L.J. [whose judgment was read by LORD HANWORTH M.R.] This appeal raises a question of great importance and difficulty with regard to the true interpretation of several sections of the Housing Act of 1925. It is worthy of note in passing that that Act takes the place of four statutes, which it repeals in whole or in part, which were known as the Housing of the Working Classes Acts of 1890 and 1894, 1900 and 1903. The title to the Act affords some ground for expecting that it is wider in its scope than the provision of houses for the working classes, and the demolition, rebuilding and regulation of such demolition and rebuilding, and of the letting and occupation of such houses.

After receipt of an official representation by the medical officer made under s. 35 of the Act, the corporation of Derby took it into their consideration, and made what purported to be an improvement scheme for an unhealthy area in their city, which for convenience may be referred to as area number 2. William Davis, an owner of one of the houses affected by the scheme, after a public inquiry by an inspector applied to the Court of King's Bench for a writ of prohibition directed to the Minister of Health prohibiting him from proceeding further in the matter of an order confirming the scheme. The Court on December 18, 1928, made an order absolute for such prohibition. This is an appeal by the Minister of Health against such order absolute. It is unnecessary to read the whole of the scheme. The only question raised in this appeal is as to the validity of the penultimate clause of the scheme. In order to consider this question it appears to me to be desirable to read not only the clause, but to read also the clauses immediately preceding and following. [His Lordship then read the clauses.] The respondents contended in the Court below that the penultimate clause invalidated the scheme, because: (1.) It did not comply with the provisions of s. 35 of the Act, which requires that an improvement scheme must be a scheme "for the reconstruction and rearrangement of the streets and houses within the area or some of such streets or houses." (2.) It was in any event too indefinite. It left undecided

what was to be done with the area. The Act contemplates a definite scheme, under which it will be shown what is to be done with the area after demolition, and the authority cannot reserve to themselves a power to dispose of it at a future time for any purpose they think fit.

Under s. 39, sub-s. 3, the Minister may confirm the scheme, subject to conditions or modifications. But it was rightly admitted by the Attorney-General that the scheme presented for confirmation must be a proper scheme under the Act, such as could be confirmed as it stands without modification, and that the fact that the Minister might modify it so as to make it a good scheme would be no answer to an application for prohibition if, when presented for confirmation, it is not a good scheme within the Act.

In my judgment the order of the King's Bench Division was right, and ought to be affirmed. The Act provides for two kinds of schemes for dealing with insanitary property, improvement schemes and reconstruction schemes. Oddly enough it seems to contemplate rearrangement and reconstruction in every case where an improvement scheme is the appropriate method of dealing with the situation, but not demolition only, while in the section dealing with reconstruction schemes it contemplates demolition without reconstruction or demolition and reconstruction. Sect. 35 reads as follows: "(1.) Where an official representation is made to a local authority as respects any area in the district of the authority either—(*a*) that any houses, courts, or alleys within the area are unfit for human habitation, or (*b*) that the narrowness, closeness, and bad arrangement, or the bad condition of the streets and houses or groups of houses within the area, or the want of light, air, ventilation, or proper conveniences, or any other sanitary defects, or one or more of such causes, are dangerous or injurious to the health of the inhabitants, either of the buildings in the area or of the neighbouring buildings; and that the most satisfactory method of dealing with the evils connected with such houses, courts, or alleys, and the sanitary defects in the area, is a scheme (hereinafter referred to as an improvement scheme)

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for the rearrangement and reconstruction of the streets and houses within the area, or of some of such streets or houses, the local authority shall take such representation into their consideration, and if satisfied of the truth thereof, and of the sufficiency of their resources, shall pass a resolution to the effect that the area is an unhealthy area and that an improvement scheme ought to be made in respect of the area, and after passing such a resolution they shall forthwith proceed to make a scheme for the improvement of the area. (2.) Any number of such areas may be included in one improvement scheme. (3.) The provisions of this Part of this Act relating to improvement schemes shall not apply to rural districts." Sect. 37 contains provisions with regard to two kinds of small areas arising from the demolition (*a*) of a single building, or (*b*) of several buildings when the area is too small to be dealt with by an improvement scheme. The section reads as follows: "In any of the following cases—(*a*) where an order for the demolition of a building has been made in pursuance of Part I. of this Act and it appears to the local authority that it would be beneficial to the health of the inhabitants of the neighbouring houses if the area of which such building forms part were used for all or any of the following purposes—(*i.*) dedicated as a highway or open space, or (*ii.*) appropriated, sold, or let for the erection of houses for the working classes, or (*iii.*) exchanged with other neighbouring land which is more suitable for the erection of such houses, and which on exchange will be appropriated, sold or let for such erection; or (*b*) where it appears to the local authority that the closeness, narrowness, and bad arrangement or bad condition of any buildings, or the want of light, air, ventilation, or proper conveniences, or any other sanitary defect in any buildings is dangerous or prejudicial to the health of the inhabitants either of the said buildings or of the neighbouring buildings, and that the most satisfactory method of dealing with the said evils is by the demolition or the reconstruction or rearrangement of the said buildings or of some of them, and that the area comprising those buildings and the yards, outhouses, and appurtenances thereof, and the site thereof,

is too small to be dealt with by an improvement scheme; the local authority shall pass a resolution to the above effect and direct a scheme (hereinafter referred to as a reconstruction scheme) to be prepared for the improvement of the said area." It will be seen that in both cases dealt with by this section there need not of necessity be any reconstruction of buildings. As to (*b*) the local authority may stop short with demolition, or they may go further, and decide that there ought to be reconstruction or rearrangement of the buildings or some of them, and in that case they are to prepare a scheme (called a "reconstruction scheme") for the improvement of the area. It is, therefore, clear that both improvement schemes and reconstruction schemes involve rebuilding or rearrangement of existing buildings. The difference between an improvement scheme and a reconstruction scheme is that an improvement scheme must contain provision for the rearrangement and reconstruction of the streets and houses in the area or some of such streets or houses, while a reconstruction scheme must provide for rearrangement or reconstruction of buildings, whether they are houses or not, and need not contain any provision with regard to streets. Sect. 38 provides that in all improvement or reconstruction schemes provision *shall* be made for proper sanitary arrangements.

It seems to me to be the meaning of s. 35 that where the local authority is satisfied that the most satisfactory method of dealing with the evils referred to in the section is an improvement scheme, they are then to pass a resolution that the area is an unhealthy area, and that an improvement scheme ought to be made in respect of the area, and they must then forthwith make an improvement scheme for the area. I cannot read the words "a scheme for the improvement of the area" as something that may be different from the "improvement scheme," which they have decided ought to be made in respect of the area. The section in my judgment contains a statutory definition of an improvement scheme as "a scheme for the rearrangement and reconstruction of the streets and houses in the area or some of such

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streets or houses." Any reading of s. 35 which would be consistent with an improvement scheme providing that the area should be a playground or open space, would in my judgment be not only contrary to the express words of the section, but would be also inconsistent with s. 38 (*c*), which requires the scheme to make provision for proper sanitary arrangements.

It follows that inasmuch as the scheme under consideration contained no provision for reconstruction of streets or houses it was not an improvement scheme within s. 35 of the Act. I agree with the view expressed by Avory J. in the Court below. We were urged by the Attorney-General to give weight to the improbability of Parliament having legislated for the building of houses on a site which by reason of its marshy character or unhealthy situation was unfit for houses. If, however, the plain words of the Act require that the scheme is so to provide, it is immaterial to consider whether Parliament ought to have made express provision for such an exceptional case. It may be, however, that though the scheme must provide for reconstruction of streets and houses, there is implied in the proviso to s. 46 a power in the Minister to order that the land when cleared shall be laid out as an open space. Be this as it may, I am clearly of opinion that to be a good scheme under the Act an improvement scheme must contain provision, with plans and estimates, for total or partial reconstruction of streets and houses in the area.

The argument for the appellant was also supported by a reference to s. 42, sub-s. 4. In my judgment this merely means that without the express authority of the Minister the local authority may not do the rebuilding of houses which the scheme provides for by their own workpeople, but in the absence of such authority they must sell or let to people who will undertake to build according to the scheme, but in any case they may make the roads themselves.

Great reliance was placed by the Attorney-General on an argument derived from the proviso to s. 46 of the Act which deals with the compensation payable to owners whose land is taken. He pointed out that the proviso deals with the

compensation to be paid in three distinct cases: (1.) where in the opinion of the Minister it is necessary that provision should be made by the scheme for the rehousing of the working classes on the land or part of it, when acquired; (2.) where he is of opinion that the land or part thereof when acquired should be laid out as an open space; and (3.) where neither of these purposes is provided for; and he argued that if the scheme could not provide for the land to be used as an open space no case would ever arise in respect of which the compensation had to be ascertained upon the basis that the land was to be used as an open space, and, therefore, he said, it must have been the intention of Parliament that the scheme for the improvement of the area might be a scheme for its improvement by conversion into an open space. There is considerable weight to be attached to this contention, but it is not in my judgment sufficient to enable us to depart from the plain words of s. 35 with regard to what an improvement scheme when sent to the Minister by the local authority must contain. It may be, as I have said, that the proviso should be read as implying power on the part of the Minister to require, notwithstanding the scheme presented to him, that the land when acquired should be laid out as an open space. It is unnecessary to decide whether such power is implied by reason of the proviso, but even if it be, it does not seem to me to affect the question as to the meaning of s. 35 with regard to the nature of the scheme which the local authority is to prepare for the consideration of the Minister. As I have said, in my judgment the scheme which the local authority must prepare is required by s. 35 to be a scheme for a rearrangement and reconstruction of streets and houses, and until they have prepared such a scheme there is nothing for the Minister to consider.

It is unnecessary to consider whether the second objection to the scheme is or is not valid, but as it has been discussed I think I ought to say that in my opinion it is a sound objection. If it be open to the authority to reserve a power of sale as part of the scheme, it would be necessary when the scheme was formulated to state the purposes for which the land

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when sold was to be used. The question whether the scheme ought or ought not to be favourably reported on by the inspector and considered by the Minister might entirely depend on the purposes for which the land is used when sold. If it were to be sold for a slaughterhouse, or an infectious hospital, the opponents of the scheme would be entitled to urge that the cure would be worse than the disease, and that the scheme should not be passed until some limitation were placed on the uses for which the land might be sold. But in my view it is not necessary to decide this point, as the first objection to the scheme is fatal to this appeal.

I only desire to add that this judgment in no way affects such rights as the corporation may have under the Lands Clauses Acts, or otherwise, to deal with surplus land.

The appeal should be dismissed with costs.

Solicitors: *Solicitor to the Minister of Health: Few & Co., for J. & W. H. Sale & Son, Derby.*

H. C. G.

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[1928. M. 180.]

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Feb. 14, 15, 28;
March 1, 5, 6, 25.

Defamation—Slander—Solicitor—Professional Privilege—Interview to obtain Loan on Purchase of Property—Loan refused—Alleged Slander of the Vendor.

Communications passing between a solicitor and a prospective client with a view to the client retaining the solicitor on professional business are privileged from disclosure, even if the solicitor does not accept the retainer.

Cromack v. *Heathcote* (1820) 2 B. & B. 4 applied.

Conversations between a solicitor and client relating to the business of obtaining a loan for the deposit on the purchase of real estate are privileged from disclosure, as the business is professional business within the ordinary scope of a solicitor's employment.

Jones v. *Pugh* (1842) 1 Phillips, 96 and *Carpmael* v. *Powis* (1846) 1 Phillips, 687 followed.

S. and T. interviewed a solicitor with a view to obtaining a loan for the deposit on a contemplated purchase of a house and with the intention, if he could find the money, of employing him to carry out the purchase; but the solicitor refused to find the money, and in stating his reasons slandered the vendor of the house, with whom he had had previous dealings:—

Held, in an action by the vendor against the solicitor T. claimed privilege from disclosing what passed at the interview that as S. and T. had gone to him in his professional capacity and on business within the ordinary scope of his business as a solicitor, the circumstances in which and the purpose for which they interviewed the solicitor showed that T.'s claim to privilege ought to have been upheld and his evidence of the defamatory statements ought not to have been admitted.

APPEAL from the verdict and judgment at trial before Horridge J. and a special jury.

In this action the plaintiff George Austin Minter sued the defendant Thomas Priest, a solicitor carrying on business under the style of Freeman Haynes & Co., for damages for slander uttered by the latter to one Taylor at an interview at the defendant's office at which Taylor and another man named Simpson were present on January 9, 1928.

The following statement of facts is taken from the judgment of the Master of the Rolls:—

The plaintiff, Minter, is described in the statement of claim as a "property dealer," and in December, 1927, he was the owner of 19 Hertford Street, Mayfair, subject to the mortgages

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upon it for a total sum of 7500*l.*, and Minter was anxious to find a purchaser of these premises. Priest had acted for Minter at one time in some matters including 19 Hertford Street, and differences had arisen between them and proceedings had been taken in the Courts, but these differences had been settled on terms agreed between them in 1925.

In December, 1927, Minter had appointed Taylor to act as his agent to find a purchaser for 19 Hertford Street at a remuneration of 100*l.* to Taylor, if he were successful in securing a purchaser, and Taylor found one Simpson. Simpson intended to buy for the purpose of selling the property again and had agreed to give Taylor one half of any profit thus obtained. Simpson's solicitors were Messrs. Parker & Thomas, who on December 20, 1927, submitted an offer of 9500*l.* for 19 Hertford Street "subject to verification of figures and contract"—and this offer was accepted by Minter, the deposit to be 5 per cent., that is 475*l.* A difficulty arose as to Simpson finding this deposit, for Sir William Thomas—the partner in the firm of Parker & Thomas—was not prepared to find, or lend this sum. Sir William Thomas suggested that Simpson and Taylor should approach the defendant Priest, and said that if Priest would lend the money he would be prepared to stand down and allow Priest to act as solicitor in carrying out the conveyance to Simpson. Accordingly, on January 9, 1928, Simpson and Taylor had an interview with Priest at his office. They told him they wanted his assistance to find the deposit of 475*l.*, and that if he found it, he should act as solicitor for Simpson in completing the purchase. Priest declined to find the money, and then spoke the slanderous words which formed the subject-matter of the action. He further said that the price of 9500*l.* which had been agreed to be paid as the price to Minter was excessive, and suggested a scheme whereby he could obtain the sale to Simpson of 19 Hertford Street from the first mortgagee at 7500*l.* Then upon a resale he, Priest, would take one-third of the profit made, and Simpson and Taylor could take and divide the other two-thirds. The whole project came to nothing. The deposit was not found and

the sale of 19 Hertford Street to Simpson was never carried out. Taylor went to Minter and told him under a "seal of honour" what Priest had said of him at the interview. Minter recorded what Taylor had told him on two sheets of script, and Taylor signed those sheets at the invitation of Minter, with the result that Minter commenced this action against Priest by writ dated January 17, 1928. In his defence in addition to the denials, putting the matters alleged against him in issue, the defendant pleaded that whatever was said by him was said at the interview at which Simpson and Taylor sought his advice as a solicitor, and thus upon a privileged occasion to which the professional privilege of a solicitor attached.

At the trial the plaintiff, in order to prove the slanders, called Taylor upon his subpœna. Taylor at once claimed privilege "inasmuch as I saw Mr. Priest in his professional capacity and on the instructions of Sir William Thomas." Horridge J. ruled that the witness must tell what took place, for he was not prepared to rule whether he was privileged from answering, until he had told exactly the circumstances under which he had seen Priest. Taylor thereupon said that he had made a statement to the defendant and given the defendant's solicitor the evidence that he was prepared to give, but he also said that he had no hesitation in telling what he knew of the matters in question though he had declined to discuss them with the plaintiff; and much later, that he did not object to what he had signed being used, for he did not desire to stand in the plaintiff's way. Horridge J. allowed the witness to be cross-examined as a hostile witness. Taylor then gave evidence that Sir William Thomas, who was acting for Simpson—as he Thomas was not prepared to find the deposit—advised Simpson and Taylor with him, to go to the defendant and waived any right on his part to act as solicitor for Simpson—if Priest found the money for the deposit. Taylor said that his object in going to Priest was to obtain "475*l.* good money and a good solicitor," and that the main object of the visit to Priest was "money for business," that money was the first thing discussed. At the interview

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Priest gave "cogent reasons why the business should not be proceeded with and then made the remarks defamatory of the plaintiff." Taylor stated that he would not have employed Priest as a solicitor unless he had found the money. "I would have gone to a solicitor who could find the money." As Priest was not prepared to find the money, the interview terminated. No charge was made by Priest for the interview, or the advice given at it.

For the defendant it is argued upon these facts that the privilege of a solicitor as to non-disclosure attached to the interview between Simpson and Taylor and Priest, and therefore that all that was said by the latter about the plaintiff cannot be revealed in evidence, and that such evidence as was given of it should have been ruled inadmissible, and that Taylor's claim of privilege at the outset of his evidence should have been respected and allowed.

For the plaintiff it is claimed that some proof must be given as to when the privilege of a solicitor attaches to what is said—both as to when the privilege began, and when it ended; and that upon the story told by Taylor, it was clear that the purpose of the interview was not primarily to seek the advice of Priest as a solicitor, but to ascertain if he would provide the sum of 475*l.* from some source, and that only upon the fulfilment of that condition was the relationship of solicitor and client to be established; and further that if such relation was established at one part of the interview, it had determined when Priest had declined to find the money, and was not in being at the time when Priest went on—after having refused to entertain the proposal that he should find the money—to give expression to his opinion of Minter in slanderous terms. It was also argued that the privilege had been waived.

On this part of the case, Horridge J. left questions to the jury which, with their answers, are as follows: 1. Did the defendant utter the words deposed to by Taylor or some and which of them? (A.) Yes, all. 2. At the time when the words complained of were uttered, did the relationship of solicitor and client actually exist between the defendant

on the one part and Simpson and Taylor, or one and which of them, on the other part? (A.) No—neither. 3. Did the defendant reasonably believe that Simpson and Taylor, or one and which of them, would wish to retain him as solicitor? (A.) No—neither. No question was put as to waiver, nor did counsel suggest that it was an issue which ought to be submitted to the jury.

The jury fixed the damages in respect of the slander found by them at 1500*l.*, and judgment was entered accordingly.

The defendant appealed.

Sir H. Maddocks K.C. and *A. E. Woodgate* for the appellant. If a person goes to a solicitor with the intention of employing him but the solicitor declines to act, all that passes at that interview is absolutely privileged. The privilege is the client's privilege, and it is when consulting a solicitor that he has to confide in him. Can it be said that these confidences are not privileged because, in the result, the solicitor declines to act for him? That when the relationship of solicitor and client is established there is absolute privilege is clear from *More* v. *Weaver*. (1) Further it has been decided that all that passes between a solicitor and a prospective client is protected by privilege, if the client retains the solicitor: *Browne* v. *Dunn*. (2)

[LORD HANWORTH M.R. Is not the true position that Taylor and Simpson went to the defendant to obtain a loan with the added inducement that if he would provide it, they would employ him as their solicitor?]

If a man goes to a solicitor to obtain an advance of money, he goes to him as a solicitor and the business is professional business. Further the absolute privilege which results applies to the whole interview. Otherwise the privilege would be of little use, as the whole of what took place would have to be given in evidence in order to ascertain what was privileged and what was not. Taylor ought never to have been compelled to give evidence after he had claimed privilege. The nature of the privilege is made clear in *Lyell* v. *Kennedy*

(1) [1928] 2 K. B. 520. (2) (1893) 6 The Reports, 67, 71, 72.

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(*No.* 2). (1) It applies in the fullest way to professional communications in a professional capacity: *Lawrence* v. *Campbell* (2); *Minet* v. *Morgan* (3); and is the privilege of the client, not of the solicitor: *Baker* v. *Carrick*. (4) When, however, there is evidence that what passed at the interview related to the committal of an intended crime or fraud, the privilege was destroyed: *Reg.* v. *Cox & Railton*. (5) But evidence of this must be obtained ab extra. Here Taylor and Simpson went to the defendant in order to raise money to effect a purchase. That is enough to make what passed privileged, at any rate until the defendant declined to provide the money or act for them in the purchase. It was in giving his reasons for this refusal that he made the statements complained; and it is immaterial whether he gave his reasons before or after the refusal. In either case the privilege applies. Horridge J. was wrong in treating the application for a loan to carry out the purchase as not part of a solicitor's professional business: see *Carpmael* v. *Powis*. (6) Further, if the interview was privileged at all it cannot be divided up, but is privileged as to the whole: *Pearse* v. *Pearse*. (7) What happened at the interview ought not to be given in evidence after a claim of privilege, unless a prima facie case is made that it related to a contemplated crime or fraud: *Bullivant* v. *Attorney-General for Victoria* (8); *O'Rourke* v. *Darbishire*. (9)

In *Greenough* v. *Gaskell* (10) certain other exceptions to the privilege of a solicitor were stated by Lord Brougham, including statements made before the solicitor was employed or after his employment ceased. Here the relationship of solicitor and client arose as soon as Taylor and Simpson went to the defendant to obtain the loan, and did not cease until he had refused to act and stated his reasons: compare as an example when the communication was made before the employment commenced, *Cuts* v. *Pickering*. (11)

(1) (1883) 9 App. Cas. 81, 86.
(2) (1859) 4 Dr. 485, 490.
(3) (1873) L. R. 8 Ch. 361.
(4) [1894] 1 Q. B. 838.
(5) (1884) 14 Q. B. D. 153.
(6) 1 Phillips, 687; 15 L. J. (Ch.) 275.
(7) (1846) 1 De G. & Sm. 12; 16 L. J. (Ch.) 153, 157.
(8) [1901] A. C. 196.
(9) [1920] A. C. 581.
(10) (1833) 1 My. & K. 98, 104.
(11) (1671) 1 Vent. 197.

[GREER L.J. referred to *Cobden* v. *Kendrick*. (1)]

There it was held that the relationship had ceased. What takes place at an interview is privileged so long as it is relevant to the matter on which the solicitor is consulted. The whole interview is privileged unless it can be shown that the real business interview had come to an end. There is no evidence of that here. Simpson and Taylor went to see the defendant not in a private capacity but to borrow money for a deposit on a contract.

[They also referred to *Watson* v. *M'Ewan* (2) and *Goldstone* v. *Williams, Deacon & Co.* (3)]

Infield and *C. G. Austin* for the respondent. The evidence which is uncontradicted, for the defendant called no evidence, is that in going to the defendant Simpson and Taylor's only object was to obtain money. In these circumstances the claim of privilege fails. Privilege is used in two senses: (1.) Privilege in connection with the production of documents; and (2.) Privilege in connection with communications. The second is based on public policy. In the case of a solicitor the privilege is not absolute, except that it protects him from being questioned as to circumstances from which malice can be inferred. But the solicitor has to show (1.) that the relationship of solicitor and client existed, and (2.) that the particular communication was relevant to the matter on which he was being consulted: *More* v. *Weaver* (4); *Browne* v. *Dunn*. (5) This privilege operates as an exception to the rule that a man is liable for the defamatory statements made by him of another man, and the exception ought not to be extended. The defendant in this case had to satisfy the jury that on the facts the relationship of solicitor and client existed, and then it is for the judge to determine as matter of law whether the occasion was privileged: *Adams* v. *Ward*. (6) When the circumstances are not in dispute the matter is one for the judge alone. The mere fact that a solicitor exercises certain activities which are ancillary to

(1) (1791) 4 T. R. 431.
(2) [1905] A. C. 480.
(3) [1899] 1 Ch. 47.
(4) [1928] 2 K. B. 520.
(5) 6 The Reports, 67.
(6) [1917] A. C. 309, 318.

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his business as a solicitor does not entitle him to privilege in respect of them. He must show that the business on which he was interviewed was connected with law. Here the interview in question was merely for the purpose of obtaining a loan. The lending of money is a purely ancillary part of a solicitor's work. It is not purely legal work, but is a matter within the sphere of activities of banks and building societies. It is not an activity peculiar to a solicitor. The object of the privilege is to enable the client to speak freely to his solicitor, and public policy is satisfied if it is confined to the legal duties of a solicitor. In *Browne* v. *Dunn* (1) the privilege in question was, it is submitted, qualified and not absolute: compare *Hebditch* v. *MacIlwaine*. (2)

The relationship of solicitor and client is contractual. Therefore to ascertain its existence and when it began, the matter must be dealt with like an ordinary contract, so that the requisites are offer and acceptance. So, too, it can be determined like an ordinary contract. There may be negotiations leading up to an offer, but the retainer of the solicitor only takes place on acceptance. Until acceptance, there is no contract. Here on the evidence there was no retainer, and there was evidence to support a finding by the jury that unless the defendant agreed to find the necessary money there was to be no retainer. It is only when the contractual relationship of solicitor and client arises that the solicitor comes under an implied contractual obligation not to disclose communications: compare *Tournier* v. *National Provincial and Union Bank of England, Ld.* (3) The negotiations are also the subject of a privilege, but it is only a qualified privilege: *Browne* v. *Dunn*. (4) After acceptance of the retainer the privilege becomes absolute: *More* v. *Weaver*. (5) Even then the privilege is confined to the matter on which the solicitor has been consulted.

[LORD HANWORTH M.R. referred to *Stuart* v. *Bell*. (6)]

The matter to which privilege applies must be germane

(1) 6 The Reports, 67.
(2) [1894] 2 Q. B. 54.
(3) (1923) 40 Times L. R. 214, 217.
(4) 6 The Reports, 67, 71.
(5) [1928] 2 K. B. 520.
(6) [1891] 2 Q. B. 341, 349.

to the relationship of solicitor and client: *Baker* v. *Carrick* (1); *Boxsius* v. *Goblet Frères.* (2) In the latter case a communication was made by a solicitor to a third party in the interest of his client, and it was held to be the subject of qualified privilege. In the present case there was never a retainer, for the matter never got beyond the stage of negotiation. Further the words complained of were uttered after the negotiations had come to an end, so that there was not even a qualified privilege; but in any case the jury found that there was malice.

But assuming the relationship of solicitor and client to have arisen, the privilege only extends to relevant communications: see Taylor on Evidence, 11th ed., p. 632. The jury were entitled in this case to come to the conclusion that the slanderous statements were voluntered by the defendant after the relationship of solicitor and client—if it had ever existed—had come to an end.

Again, if there was any privilege, Taylor, whose privilege it was, broke the seal of confidence and communicated the defendant's statements to the plaintiff. This amounts to a waiver, and Taylor could not be heard thereafter to claim privilege. Further the protection afforded is that of the client only, and the solicitor is only protected in regard to communications made by the client. Any information acquired by the solicitor from other sources is not protected: *Lewis* v. *Pennington* (3); see also *Wilson* v. *Rastall.* (4) In relation to third parties, the solicitor has the same protection as his client and no more. It is proper to take evidence to see whether the protection exists: *Bullivant* v. *Attorney-General for Victoria* (5); *Bramwell* v. *Lucas* (6); *Greenough* v. *Gaskell* (7); *Walker* v. *Wildman.* (8)

[LAWRENCE L.J. In both *Reg.* v. *Cox & Railton* (9) and *Bullivant* v. *Attorney-General for Victoria* (5) the client had gone to a solicitor for an illegal purpose. When a person

(1) [1894] 1 Q. B. 838.
(2) [1894] 1 Q. B. 842.
(3) (1860) 29 L. J. (Ch.) 670.
(4) (1792) 4 T. R. 753.
(5) [1901] A. C. 196, 206.
(6) (1824) 2 B. & Cr. 745.
(7) 1 My. & K. 98, 114.
(8) (1821) 6 Madd. 47.
(9) 14 Q. B. D. 153.

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goes to a solicitor for a proper purpose is there any right to inquire what took place at the interview on the ground that a slander may have been uttered ?]

The impropriety may be on the part of the solicitor. It is an issue of fact whether circumstances exist giving a right at law to privilege. Evidence must be admissible to determine that.

Woodgate in reply. It is a substantial part of a solicitor's business to lend money on mortgage, and the lending of money on a purchase is the proper work of a solicitor. Thus the Solicitors' Remuneration Act, 1881, and the general order thereunder fix a scale of charges for the negotiation for a loan on mortgage. In regard to a matter which is not professional business a solicitor is free to charge as he likes. Further, it was decided long ago that work in connection with sale of property and for loans on mortgages was professional work: *Jones* v. *Pugh* (1); *Carpmael* v. *Powis.* (2) It is a fallacy to say that here matters never passed beyond the stage of negotiation. A solicitor is retained as soon as a man goes to him and says that he contemplates buying a property and asks the solicitor's help in raising the purchase money, and the solicitor replies with a request to hear all the circumstances. It is possible to go to a solicitor either for advice or to instruct him to do something, and when the client asks the solicitor to raise money for him, he is asking him to do professional work. Suppose the solicitor had said that he would try and find the money and then later said he had been unable to find a client to provide the money, could it be said that the solicitor was not retained for the purpose of finding the money all that time ? If the solicitor says at once he cannot undertake the business and gives his reason, then the retainer is determined.

Again there was nothing here to leave to the jury. Taylor was the only witness on this question, and even if he contradicted himself in his evidence, that is not a matter proper to be left to the jury : *Sumner & Leivesley* v. *John Brown & Co.* (3) There was therefore nothing to leave to the jury

(1) (1842) 1 Phillips, 96, 102. (2) 1 Phillips, 687, 692.
(3) (1909) 25 Times L. R. 745.

on the question of privilege. Further, there is no ground here for saying that Taylor waived the privilege, and in any case the privilege was that of Taylor and Simpson and could not be waived by Taylor alone.

Lastly, there is no justification for allowing evidence to be given of what passed at the interview. There is no ground for removing the seal of privilege apart from cases where a prima facie case is set up that the interview was in contemplation of a crime or fraud : *Reg.* v. *Cox & Railton.* (1)

Cur. adv. vult.

March 25. LORD HANWORTH M.R. In this action the plaintiff, Minter, sued the defendant, Priest, a solicitor, for damages for slander uttered by the latter to one Taylor, at an interview held at Priest's office, at which Taylor and another man, named Simpson, were present, on January 9, 1928. The trial took place before Horridge J. and a special jury on several days in November, 1928, and upon the answers given by the jury to the several questions left to them by the learned judge, he entered judgment for the plaintiff for the amount of damages assessed by the jury, 1500*l.* From that judgment the defendant appeals to this Court, and asks that judgment should be entered for him or, alternatively, that a new trial should be ordered.

The case raises some nice questions relating to the privilege which attaches to the confidential relationship established between a solicitor and his client ; and for their elucidation it is necessary to state the facts and what took place at the trial with precision. [His Lordship then stated the facts as set out above and continued :] In my judgment no effective argument can now be made upon waiver, for the basis upon which it must rest was not established. The questions that we have to determine are whether the judge was right in leaving these questions to the jury, and whether there was any evidence relating to them proper to be left for their consideration. Certain principles have been laid down in cases

(1) 14 Q. B. D. 153.

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which are binding upon this Court, and may be usefully stated. It is clear from *More* v. *Weaver* (1) that when a solicitor has in fact been retained, all that passes between him and his client is absolutely privileged. In *Browne* v. *Dunn* (2) Lord Bowen suggests a further privilege—namely, that all that passes between a solicitor and a presumptive client with a view to the client retaining the solicitor to act for him is protected by privilege if the client does in fact retain the solicitor. In my opinion, after a consideration of the cases, I think that this last qualification is unnecessarily narrow, and that if what passes is with a view to, and for the purpose of retaining the solicitor, then it is protected even if the solicitor does not accept the retainer: see *Cromack* v. *Heathcote*. (3) Next it is clear that if a solicitor is consulted by a client for the purpose of the client learning how he may carry into effect a criminal or fraudulent purpose, the solicitor cannot claim the protection of privilege. The solicitor in such a case is not freed from his duty as a citizen to give evidence of a crime or a fraud: *O'Rourke* v. *Darbishire*. (4) It is otherwise if the client seeks the assistance of a solicitor for the legitimate purpose of being defended against a criminal charge or other proceedings brought against him upon acts already committed: *Reg.* v. *Cox & Railton*. (5)

In *Greenough* v. *Gaskell* (6) Lord Brougham upholds the privilege of a solicitor, established "out of regard to the interests of justice," to refuse to disclose matters which have come to his knowledge in the conduct of professional business for his client, even though such business had no reference to legal proceedings either existing or in contemplation—a proviso which apparently had then been in question—but he gives several exceptions, and among them the following: (1.) When the communication was made before the attorney was employed as such; or (2.) after his employment had ceased; or (3.) where, though consulted by a friend because he was an attorney, yet he refused to act as such, and was

(1) [1928] 2 K. B. 520.
(2) 6 The Reports, 67, 71, 72, 80.
(3) 2 B. & B. 4, 6.
(4) [1920] A. C. 581, 604.
(5) 14 Q. B. D. 153, 167, 175.
(6) 1 My. & K. 98, 104.

therefore only applied to as a friend; or (4.) where the thing disclosed had no reference to the professional employment, though disclosed while the relation of attorney and client subsisted. *Cuts* v. *Pickering* (1) affords an illustration of No. 1, *Cobden* v. *Kendrick* (2) of No. 2, and Nos. 3 and 4 are obvious exceptions, as Lord Brougham points out in developing his judgment, to a rule which applies to what is in its essence a professional privilege, and is confined to counsel, solicitors and attorneys when acting in their respective characters: see *Wilson* v. *Rastall* (3); *Lewis* v. *Pennington* (4); and *Bramwell* v. *Lucas*. (5) This privilege is the privilege of the client, as has been often explained, and is an absolute privilege in the sense that if the relation from which it arises is established, the matters which occurred during its continuance cannot be inquired into: see *More* v. *Weaver*. (6)

There may be a qualified privilege, or protection from liability, for the publication of defamatory matter which is given by the law of libel on certain occasions, before or after the stage of the privilege of an attorney from disclosure has begun or ended, such as arises where one party makes a statement to another and both have a corresponding interest and duty in respect of the subject-matter of it, as in *Hebditch* v. *MacIlwaine* (7) and *Stuart* v. *Bell* (8), but that claim is not relied upon in the present case. It is the privilege from disclosure, of the client in his communications with his solicitor, which is claimed to exist and to afford a protection to the defendant here, because it is claimed that the nature of the business upon which Simpson and Taylor went to consult Priest is to be characterized properly as solicitor's business. The two cases of *Jones* v. *Pugh* (9) and *Carpmael* v. *Powis* (10) were cited to us as establishing this latter proposition. In the former Lord Lyndhurst definitely states that it is the business of a solicitor to lay out money for his clients, and in

(1) 1 Vent. 197.
(2) 4 T. R. 431.
(3) 4 T. R. 753.
(4) 29 L. J. (Ch.) 670.
(5) 2 B. & Cr. 745.
(6) [1928] 2 K. B. 520.
(7) [1894] 2 Q. B. 54.
(8) [1891] 2 Q. B. 341.
(9) 1 Phillips, 96.
(10) 1 Phillips, 687.

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the latter that it is an ordinary part of a solicitor's business to treat for the sale or purchase of estates for his client, and that the fixing of a reserve and other matters connected with the sale are all part of the transaction, and that it is not possible to dissect the proceedings at an interview for the purpose into parts which are and parts which are not protected without getting involved in inextricable confusion. I respectfully agree with these observations and disagree with the dictum in *Walker* v. *Wildman* (1), which described a treaty for the purchase of an estate as a matter not professional to a solicitor.

How then is it to be determined when and how far these rules apply to establish or to prevent the existence of professional privilege? In all such cases some evidence must be relied upon to determine whether the facts fall within the rule or the exceptions, for if no such evidence is to be given, to advance the claim of privilege must be held sufficient to establish it.

It is not in the present case necessary to determine what allegations or evidence of fraud or crime will justify the uncovering of the seal of confidence when that confidence has been established. If it were necessary to decide this question the answer appears to be stated in the concluding passages of the full Court in the case of *Reg.* v. *Cox & Railton* (2), and in the words of Lord Finlay in *O'Rourke* v. *Darbishire* (3): "There must be something to give colour to the charge. The statement must be made in clear and definite terms, and there must further be some prima facie evidence that it has some foundation in fact." These words were expanded by Lord Sumner (4) and Lord Wrenbury (5), following Lord Halsbury's words in *Bullivant* v. *Attorney-General for Victoria.* (6)

Just as some evidence is necessary to displace it, so some evidence is necessary to establish it. In my judgment it is not sufficient for the witness to say, "I went to a solicitor's

(1) 6 Madd. 47.
(2) 14 Q. B. D. 153, 175, 176.
(3) [1920] A. C. 581, 604.
(4) [1920] A. C. 614.
(5) Ibid. 633.
(6) [1901] A. C. 196, 201.

office." Evidence is admissible to challenge the inference intended to be deduced from that statement that the subsequent interview must be held to be professional, and that what took place at it is privileged from disclosure. This evidence need not be derived ab extra. Questions are admissible to reveal and determine for what purpose and under what circumstances the intending client went to the office. His bare answer, "I went to consult him as a solicitor," is not sufficient to close the inquiry. The objection to this course stated in *Reg.* v. *Cox & Railton* (1), that if this course is permitted—"the secret must be told in order to see whether it ought to be kept"—does not avail. I respectfully agree with the rule laid down by the full Court, which in my judgment applies to the evidence admissible on the question whether privilege is established as well as to its destruction—"Courts must in every instance judge for themselves on the special facts of each particular case, just as they must judge whether a witness deserves to be examined on the supposition that he is hostile, or whether a dying declaration was made in the immediate prospect of death."

Applying this rule to the present case, it appears to me that the learned judge was quite right in admitting the evidence as to the circumstances under which, and the purpose for which, Simpson and Taylor left Sir William Thomas and resorted to the defendant.

Unfortunately the cases to which the attention of this Court was drawn—the cases of *Jones* v. *Pugh* (2) and *Carpmael* v. *Powis* (3)—were not cited to the learned judge, and in his very careful summing up and clear direction to the jury he draws a distinction between a visit to the defendant for the purpose of getting a loan wherewith to make the deposit on the contract of purchase of 19 Hertford Street, and for the purpose of consulting Priest as a solicitor. His words are: "I do not think you would say that because a man goes to a solicitor and asks him if he can advance money on mortgage, or advance money for a deposit, necessarily it

(1) 14 Q. B. D. 153, 175, 176. (2) 1 Phillips, 97.
(3) 1 Phillips, 687.

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is a question of a solicitor advising him, or that there is the relationship of solicitor and client, unless the man is prepared to advise him on some matter connected with it as to which his advice is sought, or in fact makes the advance and therefore becomes the solicitor." These words limit too narrowly the ambit of a professional interview between solicitor and client. There are other passages to the same effect. The learned judge drew the distinction, which, by reason of the absence of the authorities already mentioned, he intended to draw.

Now the evidence that was given on this point was all one way. It confirmed the view that the visit to Priest was upon professional business, as interpreted by Lord Lyndhurst, and established the professional privilege before the evidence of the defamatory statements was given. The evidence does not prove that the professional interview had ceased when these statements were made. There is no demarcation shown between the interchange of facts and opinions at the interview and the defamatory statements. The latter appear to have been given as reasons why Priest refused to engage in the enterprise or assist the client, and not as disconnected observations made independently of what had gone before. The observation of Lord Lyndhurst as to "inextricable confusion" applies aptly to the contention that the privilege had come to an end.

It appears therefore that the only evidence given affirms that the slanders were spoken at a time when professional privilege had been established and before it was determined. There was no evidence in a contrary sense. The judge therefore ought not to have left questions 2 and 3 to the jury, but to have ruled that, upon the only evidence tendered, the interview was protected by professional privilege, and that the evidence of what the defendant said could not be admitted. In thus setting aside the verdict and judgment of the learned judge, I should like to express regret that the cases which rendered this course necessary were not called to his attention, for he had taken every care to present the case properly to the jury, and had framed his questions in a manner which I confess for my part I thought quite correct until I had had

the advantage of an argument which was not presented to the learned judge.

The result must be that the appeal must be allowed with costs, the verdict and judgment must be set aside and judgment entered in the action for the defendant with costs.

LAWRENCE L.J. The words complained of in this action were found by the jury to have been uttered by the defendant at an interview between himself, Simpson and Taylor, held on January 9, 1928, in the defendant's office in Great James Street, Bedford Row, where he was practising as a solicitor. At the trial Taylor was called as a witness by the plaintiff to prove that the defendant had uttered the words complained of. Taylor, before giving evidence as to what was said at the interview, claimed privilege from disclosure on the ground that he had gone to see the defendant in his professional capacity. Horridge J. overruled this objection. Taylor thereupon was first examined, and later (by permission of the learned judge) cross-examined by counsel for the plaintiff as to what passed at the interview. If Taylor was entitled to sustain his claim to privilege and to keep his lips closed as to the communications which passed at the interview the plaintiff's case would necessarily have failed, as his was the only evidence that the words complained of were uttered, and the defendant would have been entitled to judgment. The question therefore arises whether the learned judge was right in making Taylor disclose what took place at the interview.

The facts relevant to this question are not in dispute. The plaintiff owned a freehold property in London known as 19 Hertford Street, which was heavily incumbered. Being desirous of selling this property the plaintiff instructed Taylor to find a purchaser, agreeing to pay him a commission for his services in the event of his being successful. Taylor thereupon introduced Simpson to the plaintiff as a probable purchaser. An arrangement had been made between Simpson and Taylor that the former should enter into a contract with the plaintiff to buy the property, and that thereupon the property should be resold at an enhanced price and

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the profit divided between Simpson and Taylor. Simpson accordingly instructed Messrs. Parker & Thomas (a firm of solicitors practising in the city) to carry out the transaction, and Sir William Thomas (a partner in that firm) attended to the matter. The purchase price was fixed at 9500*l.*, and the amount of the deposit to be paid on the signing of the contract at 475*l.* As neither Simpson nor Taylor had sufficient money to pay the proposed deposit, they requested Sir William Thomas to advance or raise the sum required. This Sir William Thomas was unable or unwilling to do, but he recommended them to go to the defendant, who might be able to raise the necessary money, in which case he authorized them to say that he had no objection to the defendant acting as their solicitor in carrying through the transaction, and that he (Sir William Thomas) would "stand down." The position at this juncture therefore was that there was no concluded contract between Simpson and the plaintiff to purchase the property, the terms of which contract (other than the amount of the purchase money and of the deposit) had still to be negotiated; that there was no chance of any such contract being entered into at all unless Simpson and Taylor could raise the amount required for the deposit; and that there was no prospect of obtaining any advance on the security on the contract without satisfying the lender that there would be no danger of the deposit being forfeited by the vendor.

In these circumstances Simpson and Taylor, who wanted to go on with their speculation, acted on Sir William Thomas' recommendation and went to see the defendant, who was known to Simpson through having acted as his solicitor in previous transactions. The interview which then took place lasted a considerable time, and it was during this interview that the words complained of were found to have been uttered by the defendant. It is plain that the object with which Simpson and Taylor went to the interview was to ascertain whether the defendant would advance or raise the amount required to pay the proposed deposit, and if so, whether he would act for them in completing the contract and generally in carrying out the contemplated transaction. All the matters

which Simpson and Taylor desired the defendant to undertake on their behalf (including the finding of the necessary money to pay the deposit) in my opinion clearly come within the scope of the ordinary business of a solicitor, and there cannot, I think, be any reasonable doubt that Taylor went to see the defendant in his professional capacity and for no other purpose. The upshot of the interview was that the defendant declined to find the money or to accept the employment offered to him, and Simpson and Taylor thereupon did not proceed further with the purchase of the plaintiff's property. The defendant did not charge any fee for the interview.

The defendant, in his defence and through his counsel at the Bar, denied having uttered the words complained of, but in view of the claim to privilege made by Taylor and of the fact that Simpson had not waived his privilege, Sir Henry Maddocks, who appeared on behalf of the defendant, stated to us that he felt himself unable to cross-examine Taylor or to put the defendant into the witness box and give an account of what actually took place at the interview, without involving the defendant in a breach of professional confidence and of the well established principle that a solicitor is bound to claim the privilege which attaches to all communications passing between the solicitor and his clients in the course and for the purpose of his employment. Sir Henry Maddocks therefore took upon himself the responsibility of not cross-examining Taylor and of not calling the defendant, and in the result the jury found a verdict for the plaintiff with 1500*l.* damages.

Mr. Infield, for the plaintiff, contended before us that the privilege from disclosure only arises after the relationship of solicitor and client is established, and that as such a relationship is a contractual relationship it is not established until a solicitor accepts the employment offered to him by a would-be client, with the result that if the solicitor should decline the employment the communications passing between them are not privileged from disclosure.

In my opinion this contention is not well founded. The decision in *Cromack* v. *Heathcote* (1) is a direct authority to

(1) 2 B. & B. 4.

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the contrary. That case (which was approved in *Greenough* v. *Gaskell* (1) and other cases) has in the past been chiefly cited for the proposition (now settled) that the privilege from disclosure is not confined to communications made in the course of a suit (see *Reg.* v. *Cox & Railton* (2)), but it also decided the point now taken by Mr. Infield. There the defendant proposed to call an attorney named Smith to prove that the plaintiff had applied to him to draw an assignment which the defendant alleged Smith had refused to do on the ground that the assignment, if made, would have been fraudulent. At the trial Richards C.B. rejected this evidence, on the ground that it was a confidential communication made to an attorney, and the jury found a verdict for the plaintiff. On a motion to set aside this verdict and for a new trial the Court of Common Pleas upheld the ruling of the Chief Baron. Dallas C.J. (after having stated that the plaintiff went to employ Smith, though Smith happened to refuse the employment) said: "Here is a client who goes to give instructions touching a deed, and the communication must be deemed confidential, as between attorney and client, though the attorney happens to refuse the employment. I have no manner of doubt on the subject; and it might be of most mischievous consequence if, by granting a rule, we should be supposed to have cast any doubt on it." And Burrough J. said: "It would be most mischievous if it were once doubted whether or no a communication such as this were confidential as between attorney and client." *Cromack* v. *Heathcote* (3) was followed on this point by Parke J. in *Doe* d. *Shellard* v. *Harris* (4), where the learned judge said: "I am of opinion that the privilege applies to all cases where the client applies to the attorney in a professional capacity, and an application to draw a deed is, I think, of that description." These two cases have never, so far as I am aware, been doubted; and they are cited in Bray on Discovery, p. 378, for the proposition that the privilege from disclosure attaches, although the solicitor ultimately refuses the

(1) 1 My. & K. 98.
(2) 14 Q. B. D. 153, 174.
(3) 2 B. & B. 4.
(4) (1833) 5 C. & P. 592.

employment. In both the cases it was the solicitor who claimed the privilege. This he was bound to do in the interests of his client, whose privilege it was. In some respects, no doubt, the privilege from disclosure which a solicitor is entitled and bound to claim on behalf of his client covers a wider ground than that which the client can himself assert, but in the circumstances of the present case the privilege is co-extensive, and therefore the cases dealing with the privilege from the solicitor's point of view are applicable to the question whether Taylor was entitled to claim privilege.

It has long since been established that it is not necessary for the purpose of obtaining protection from disclosure that the communications should be made either during or relating to an actual or expected litigation, and that it is sufficient that they pass as professional communications in a professional capacity: see *Lawrence* v. *Campbell* (1), approved by Lord Selborne in *Minet* v. *Morgan*. (2) This proposition was not disputed by Mr. Infield.

In my opinion Sir Henry Maddocks was right in his contention, that for the purposes of this rule the confidential relationship between solicitor and client is constituted from the moment when the solicitor invites a person who has come to him on a matter within the ordinary scope of a solicitor's business to tell him what he has come about, and that it is immaterial whether the solicitor, after hearing what the person has to say, accepts the employment or not. If it were otherwise it would prevent the communications passing at such an interview from being free and unfettered by any fears of the consequences, which is the foundation of the privilege from disclosure. It would, in my opinion, be highly mischievous if either the solicitor or the client could be compelled at the instance of a third party to disclose any such communications. The privilege from disclosure, however, does not extend to communications made to a solicitor by a person who intends to commit a crime or a fraud for the purpose of being guided or helped in the commission of

(1) 4 Dr. 485, 490. (2) L. R. 8 Ch. 361.

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it: *Reg.* v. *Cox & Railton.* (1) But even in such a case, in order to displace the privilege it is not sufficient merely to allege that the solicitor was consulted in furtherance of a crime or fraud, a prima facie case must be made out in fact: *Bullivant's* case (2); *O'Rourke* v. *Darbishire.* (3)

In *Greenough* v. *Gaskell* (4) Lord Brougham mentions a number of apparent exceptions to the rule, the first of which is where the communication was made before the attorney was employed as such or after his employment had ceased. It is plain however from the rest of his judgment that Lord Brougham did not intend to include in this apparent exception communications passing between a person approaching a solicitor in his professional capacity and that solicitor, where the latter declines the employment, because later on in his judgment Lord Brougham expressly approves of *Cromack* v. *Heathcote* (5), mentioning, without comment, the fact that there the solicitor refused the employment, and states (4), in reference to the apparent exceptions, that in such cases "it is plain that the attorney is not called upon to disclose matters which he can be said to have learned by communication with his client or on his client's behalf, matters which were so committed to him in his capacity of attorney and matters which in that capacity alone he had come to know." The concluding words of this passage are just as much applicable to a case where the solicitor refuses the employment as to a case where he accepts it.

It appears from the summing up in the present case that Horridge J. held the view that the communications between Taylor and the defendant at the interview would have been privileged from disclosure if Taylor had gone to see the defendant in reference to a matter upon which he had wanted advice, but that if he went to the defendant merely to ask him if he could advance or raise money on mortgage or money for a deposit on the proposed purchase the communications passing between them would not be privileged from disclosure.

(1) 14 Q. B. D. 153, 174.
(2) [1901] A. C. 196.
(3) [1920] A. C. 581.
(4) 1 My. & K. 98, 104.
(5) 2 B. & B. 4.

Holding that opinion the learned judge told the jury that he felt himself bound to get Taylor to state exactly what happened at the interview in order to see whether the relationship did or did not exist. Taylor's evidence of what took place at the interview left it in doubt whether the defendant uttered the words complained of before or after he had told Simpson and Taylor that he would not act for them, and also left it in doubt whether they asked the defendant to advise them as to the acquisition and resale of the property. The learned judge put it to the jury in this way: "I do not think you would say that because a man goes to a solicitor and asks him if he can advance money on mortgage, or advance money for deposit, necessarily it is a question of a solicitor advising him or that there is the relationship of solicitor and client, unless the man is prepared to advise him on some matter connected with it as to which his advice is sought or in fact makes the advance, and therefore becomes the solicitor." With the greatest respect for the learned judge I think that the opinion so expressed was wrong, in that it excluded from the ordinary scope of a solicitor's business matters which came within it and placed an undue limitation upon the privilege from disclosure. The learned judge in my opinion committed the error of allowing the privilege to be violated in order to see whether it existed.

In *Jones* v. *Pugh* (1) (decided so long ago as the year 1842) Lord Lyndhurst L.C. stated that it was an ordinary part of a solicitor's duty to lay out moneys for his clients, and that if the discovery as to the mortgage transaction there in question could not be given without a breach of professional confidence no inconvenience which the plaintiff might be put to by the want of it could be a reason for compelling the defendant to give it. There is also a passage in the judgment of the same Lord Chancellor in *Carpmael* v. *Powis* (2), which in my opinion has a direct bearing upon the extent of the privilege from disclosure in such a matter as that about which Simpson and Taylor went to see the defendant. Lord

(1) 1 Phillips, 96, 102. (2) 1 Phillips, 687, 692.

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Lyndhurst there said: "I am of opinion that the privilege extends to all communications between a solicitor, as such, and his client, relating to matters within the ordinary scope of a solicitor's duty. Now it cannot be denied that it is an ordinary part of a solicitor's business to treat for the sale or purchase of estates for his clients. For some purposes his intervention is indispensable in such transactions: he is to draw the agreements, to investigate the title, to prepare the conveyance. All these things are in the common course of his business. But it is said that the fixing of a reserve bidding and other matters connected with the sale are not of that character, inasmuch as they might be entrusted equally well to any one else. It is impossible, however, to split the duties in that manner without getting into inextricable confusion. I consider them all parts of one transaction—the sale of an estate: and that a transaction in which solicitors are ordinarily employed by their clients. That being the case, I consider that all communications which may have taken place between the witness and his client in reference to that transaction are privileged." The observations of Lord Lyndhurst, especially as to splitting the duties of a solicitor, are peculiarly apposite to the present case. Here it would be difficult to separate the raising of the money for the deposit from the completion of the agreement under which it was to be paid and from the completion of the purchase of the property the subject-matter of the agreement, even if the question of the resale could have been left out of consideration which, in the circumstances, seems to me extremely doubtful. In my opinion the transaction about which Simpson and Taylor went to see the defendant was one which necessarily involved the intervention of a solicitor, and came well within the ordinary scope of a solicitor's duties. The General Order under the Solicitors' Remuneration Act, 1881, fixes a scale of charges for all the work which Simpson and Taylor wanted the defendant to do for them—namely, the negotiation and completion of the agreement for purchase, the negotiation for a loan for the deposit and the completion of the security therefor,

and the investigation of the vendor's title to the property and the completion of the purchase.

In the circumstances I am of opinion that the learned judge ought to have upheld Taylor's claim for privilege, and ought not to have permitted the plaintiff's counsel to examine or cross-examine him as to what passed at the interview.

In the course of the argument counsel referred us to the cases of *Browne* v. *Dunn* (1) and *More* v. *Weaver* (2), and especially to the observations of Lord Herschell L.C. and Lord Bowen in the former case, to the effect that if a solicitor has reason to believe that his services may be required by a possible client who afterwards does retain him communications passing between the solicitor and client relevant to the retainer are covered by professional privilege. In both these cases the documents containing the defamatory words had been disclosed to the respective plaintiffs before action brought, and the sole question was whether the statements contained in them were made on a privileged occasion. In neither case did the question as to privilege from disclosure arise for consideration by the Court. It was contended on the present appeal, however, that the observations of Lord Herschell L.C. and Lord Bowen, to which I have referred, showed that a limit ought to be placed on the privilege from disclosure by confining it to communications made before an actual retainer, and that if no retainer resulted the privilege did not attach. In my opinion these observations were not intended to impose any such limitation in a case like the present; they must be read in the light of the facts of that case. There the solicitor had exhibited a written retainer containing the alleged libel to persons who had not approached him in his professional capacity or at all, inviting them to sign it, and the question was whether the retainer was a sham got up by the defendant for the purpose of disparaging the character of the plaintiff or whether the defendant reasonably believed that the persons to whom he exhibited the retainer would desire to retain him. The observations relied upon by the appellant were directed to these facts, and in my opinion not intended to

(1) 6 The Reports, 67, 72, 80. (2) [1928] 2 K. B. 520.

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be applicable to a case where the person claiming privilege had approached the solicitor in his professional capacity and where the only evidence of publication consisted of the evidence extracted from that person at the trial against his wish and in spite of his claim to privilege.

There remains the point taken by Mr. Infield that Taylor had waived his privilege before action brought by informing the plaintiff of what had taken place at the interview and also during his cross-examination at the trial. The answer to this point is that the learned judge did not purport to overrule Taylor's claim to privilege on the ground of waiver, but on the ground that in the circumstances the veil of confidence ought to be lifted. The onus of proving waiver rested on the plaintiff, and the learned judge before rejecting Taylor's claim on that ground would have had to hear the plaintiff's evidence in support of the waiver. There would have been difficulties in the way of trying such an issue, as Taylor was not a party to the action, and as the issue of waiver it was not one of the issues in the action. The defendant's counsel could take no part in it, and Simpson, who shared the privilege, was not before the Court. Moreover Taylor, who had merely attended as a witness on subpœna, would in my opinion have been entitled to legal assistance on such a question, as an adverse finding might get him into difficulties with Simpson. As to any suggested waiver by Taylor during his cross-examination, I am of opinion that after he had claimed the privilege and had been told by the learned judge to state what took place at the interview it would not be right for this Court to hold that he had waived his privilege, especially in the absence of any ruling by the learned judge on this point, and merely because when pressed in cross-examination, after having been obliged to give evidence as to what had passed at the interview, he stated that he did not want to stand in the way of the plaintiff using the statements which he had made to him. It must be remembered that Taylor could not properly waive the privilege without Simpson's consent, and that even if Taylor had waived the privilege the defendant could not without committing a

breach of professional confidence as against Simpson disclose what took place at the interview.

In the result, for the reasons stated, I agree that the appeal should be allowed and judgment entered for the defendant.

GREER L.J. After mature consideration of the argument presented to this Court and the various cases cited in the course of the argument I have come to the conclusion that I ought to revise the prima facie view that must have been apparent from observations I made during the course of the argument. I have, therefore, come to the same conclusion as my Lords, that this appeal must be allowed and judgment entered for the defendant with costs.

The appellant, who was defendant in an action for damages for slander in which the respondent obtained a verdict and judgment for 1500*l.*, asks this Court to decide that the verdict and judgment were wrong, and that he is entitled to have judgment entered for him. The notice of appeal claimed in the alternative an order for a new trial.

The main question in this appeal is whether there was any evidence of publication which it was permissible in law to leave to the jury. The facts so far as material lie in a small compass, and indeed are not in dispute.

The plaintiff, George Austin Minter, a dealer in real estate, employed an agent, Henry Malcolm Taylor, to procure a purchaser for a house, No. 19 Hertford Street, which he wanted to sell. Taylor, in addition to being the plaintiff's agent for sale of 19 Hertford Street, had agreed to buy from the plaintiff No. 107 Fairlop Road.

Taylor introduced a Mr. Simpson to the plaintiff as a possible purchaser of 19 Hertford Street at the plaintiff's price of 9500*l.* Negotiations were entered into with Simpson for the purchase of 19 Hertford Street, and it was anticipated that if the transaction went through Simpson, with Taylor's assistance, would be able to sell at a profit, which he undertook to share with Taylor. Messrs. Parker & Thomas were retained by Simpson and Taylor to act as solicitors in carrying out the negotiations, and if they resulted in a contract, in completing

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the purchase. They also acted as solicitors for Taylor in connection with the purchase of 107 Fairlop Road. Simpson could not provide the money required for the purchase of 19 Hertford Street. The usual 10 per cent. required by the vendor was reduced to 5 per cent., and Simpson and Taylor went to see Sir William Thomas of Parker & Thomas, to ascertain whether he could find this sum to enable the business to go forward. He declined to do so, but recommended them to go and see the defendant, who is a solicitor, and see whether he would be prepared to find the money for the deposit. Sir William stated that if Priest would find the deposit he would stand down, and they could have Priest as solicitor in the transaction. Simpson and Taylor then went to see the defendant, their main object being to obtain the necessary money for the deposit. They explained the position to him, telling him that if he found the money he could act as their solicitor in the matter. After listening to them he refused the financial assistance asked for, and then said he would give them cogent reasons for doing so. He then made the statements complained of in the action, which were grossly defamatory of the plaintiff, and advised Simpson and Taylor to have nothing further to do with the transaction. Taylor, whose evidence was the only evidence as to the interview, stated that they had not asked the defendant for his advice, and that it was voluntary. Taylor then saw the plaintiff, and under his "seal of honour" told him the substance of what the defendant had said about him, and afterwards signed two notes recording the defamatory statements complained of, which charged the plaintiff (inter alia) with robbing a poor postmistress, robbing his own brother, cheating a poor fellow out of 150*l*., and alleging he would soon be "doing time." In the course of making these defamatory statements he said he had acted for the plaintiff when he purchased 19 Hertford Street.

Before giving his evidence Taylor said: "I claim privilege, inasmuch as I saw Mr. Priest in his professional capacity." The judge, I think rightly, refused at this stage to rule that the witness was entitled to refuse to answer, until the witness

gave evidence as to the circumstances under which he saw the defendant. The witness then gave evidence of the facts leading up to the interview, which I have already stated. Notwithstanding his claim of privilege he was allowed to give an account of all that passed at the interview. The learned judge came to the conclusion that as a witness he was hostile to the plaintiff, and allowed the plaintiff's counsel to cross-examine him. In the course of his cross-examination certain questions and answers were put and given on which the plaintiff's counsel at the hearing of the appeal based a contention that the witness had waived or withdrawn his claim of privilege.

Two questions arise for decision: (1.) Was Taylor's claim of privilege good in law? (2.) If so, was the objection to the admissibility of the evidence removed by waiver? It will be observed that Priest never at any point of the interview accepted a retainer for Simpson and Taylor or either of them. The contractual relationship of solicitor and client was never established. Priest refused the only condition on the performance of which he was to be their solicitor.

It was argued for the plaintiff: (1.) That the lending of money to enable a client to purchase property is not, strictly speaking, solicitors' business, though it may be done by a solicitor, and it is therefore outside the area of those confidential communications which the Courts, on the ground of public policy, treat as privileged from disclosure. (2.) That in any event, as there was no retainer there was no relationship of solicitor and client that could give rise to a lawful claim of privilege. (3.) That by his signed statements, and by his evidence in Court, the witness had waived or withdrawn his privilege.

In order to decide the validity or otherwise of these contentions, it seems desirable to state such principles of law as have been established by the decisions of the Courts, or by reasonable inference from those decisions. (1.) After some difference of opinion it has been established that the privilege is not confined to the conduct of litigation, or to advice obtained for the purposes of existing or contemplated

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litigation. It applies to communications between client and solicitor in respect of all matters that come within the ordinary scope of professional employment: *Greenough* v. *Gaskell* (1); *Carpmael* v. *Powis* (2); *Jones* v. *Pugh* (3); *Lawrence* v. *Campbell*. (4) It seems therefore impossible to hold that the privilege does not apply to conversations between solicitor and client relating to the business of obtaining a loan for the deposit on the purchase of real estate, business which it cannot be disputed is within the ordinary scope of a solicitor's employment. (2.) If the assistance of a solicitor is sought by a would-be client in respect of a matter within the ordinary scope of a solicitor's employment, the privilege attaches, even though the solicitor declines to undertake the work. I think this proposition is a legitimate inference from the decision of the House of Lords in *Browne* v. *Dunn* (5), where it was held that privilege under the law of libel and slander applied to a communication from a solicitor to a person who was expected to become a client. The headnote accurately states what was decided in these words: "If a solicitor reasonably believes that his services may be required by a possible client who does afterwards retain him, all communications passing between the solicitor and the client, leading up to the retainer and relevant to it, and having that, and nothing else, in view are privileged." This no doubt is concerned with the question whether the case occasion was privileged within the rules of law applicable in the law of defamation, but in order to determine that question the Court had to consider and decide whether communications which preceded the retainer were within the privileged occasion, and it seems to me not unreasonable to apply similar considerations to the question in this case, as to when a claim to the privilege of non-disclosure begins to apply and become available in law. In *Browne* v. *Dunn* (5) the Court states that the privilege in the law of defamation arose if the communication was before the retainer and retainer followed, but they were only dealing with a case in

(1) 1 My. & K. 98.
(2) 1 Phillips, 687.
(3) 1 Phillips, 96.
(4) 4 Dr. 485.
(5) 6 The Reports, 67.

which retainer had followed. They did not necessarily mean to decide that the privileged occasion would not have arisen if retainer had not followed, and I do not myself think that any question of privilege, whether it be a privilege of non-disclosure or a privileged occasion within the law of libel, can depend on whether negotiations result in retainer or do not result in retainer. It cannot be that communications which would be privileged if the negotiations are successful are without privilege if they are unsuccessful. There is authority in Courts of first instance for this view in two cases which have been cited in the judgments of the Master of the Rolls and Lawrence L.J. Further, it is well established that the privilege of non-disclosure is intended not for the protection of the solicitor, though in practice it operates for his protection, but for the protection of a client seeking advice or legal assistance. It seems to be just as necessary that the protection should apply for the benefit of a person who is seeking advice or assistance, notwithstanding the fact that the solicitor who is consulted decides after hearing him that he is not prepared to give the advice or assistance sought. I think the communications passing between a would-be client and a solicitor whose assistance or advice he is seeking are within the area of matters which are protected from disclosure by the rule relating to privileged communications to a solicitor.

But it is to be observed that in this case the defamatory statements were not made until after Priest had said that he would not advance the money, and so would not act as solicitor to Taylor and Simpson. After stating this he gave what he called "cogent reasons" for his decision. I have had considerable doubt whether under these circumstances his defamatory words can be said to form part of the consultation on the question whether he would give his financial and legal assistance. But on consideration I have, with some hesitation, come to the conclusion that all that passed at the interview is within the area of the privilege. If the defendant had made the defamatory statements before saying that he would not assist Taylor and Simpson financially or legally, it

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could not be said that the words used by him in order to satisfy his would-be clients that he had good reasons for refusing to act would be outside the protection afforded by law to communications made by a solicitor, and I think that the fact that he made his statements in a different order by saying, "I will not act, and the following are my 'cogent reasons' for not doing so," ought not to make any difference to the answer which should be given to the question whether these statements are covered by privilege or not.

With reference to the argument based on waiver, I am of opinion that this cannot succeed for two reasons: (1.) I think there was no sufficient evidence of waiver. The witness having made his signed statement, as he said, "under the seal of honour," and having only after the judge has in effect overruled his claim to privilege expressed his willingness to allow his statement to be used, it cannot be said that he waived his privilege. After the judge had refused to allow his claim of privilege he was bound to state freely all that had taken place at the interview. (2.) Waiver is a question of fact, and the plaintiff did not at the trial ask for any finding of the jury on the subject; no question of waiver was submitted to the jury, and there is no finding on the subject.

For these reasons I think the judge should have disregarded the evidence of publication which was given by Taylor after his claim of privilege, and should have given judgment for the defendant with costs. Some of Taylor's evidence as to what took place at the interview was, in my judgment, properly admitted, possibly the whole of it, to enable the judge to decide whether the case was one in which the claim of privilege should be allowed. But if the evidence showed, as I think it did, that the claim of privilege was well founded, it should have been treated as a nullity, in which case there would have been no evidence of publication to go to the jury. It seems desirable to add that it has been unnecessary to decide whether, if the evidence had been properly before the Court by reason of waiver of privilege or otherwise, the occasion would have been one of absolute or only of qualified

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privilege. I desire to reserve my opinion on this important and difficult question. The area of absolute privilege in the law of libel may be narrower than the area of the privilege of non-disclosure.

For these reasons I agree with the judgments which have been delivered. I should like to add, that I was greatly impressed by the admirable argument presented to this Court by Mr. Infield.

Appeal allowed.

Solicitors: *Freeman Haynes & Co.; Clarke & Co.*

H. C. G.

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[1928. J. 2421.]

Landlord and Tenant—Rent Restriction—Recovery of Possession—Statutory Tenancy—Whether statutory Tenancy transmissible by Will—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*f*), (*g*).

The right of a statutory tenant under the Increase of Rent, &c., Act, 1920, is a purely personal right and cannot be transmitted by will. Principle of *Keeves* v. *Dean* [1924] 1 K. B. 685 applied.

APPEAL from a decision of MacKinnon J. in an action tried at Taunton.

By an agreement made in 1913 one Baxter let to Mrs. Vincent the George Hotel, Yeovil, at a yearly rent of 35*l.* 10*s.* On March 11, 1920, Baxter's executors gave notice to Mrs. Vincent to quit and give up possession of the premises on March 25, 1921; but as the premises were within the provisions of the Rent Restriction Acts Mrs. Vincent claimed to be entitled to remain in possession, and in fact did so till her death on August 8, 1928. She had a daughter—the present defendant—living with her up to the time of her death.

In 1903 Mrs. Vincent made a will by which the defendant was made executrix and sole beneficiary. Probate of the will was granted to the defendant in September, 1928. After

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the death of Mrs. Vincent the defendant claimed to be entitled to continue in occupation of the premises. Thereupon the plaintiffs, who by this time had become the landlords, took proceedings to recover possession and mesne profits from August 8 until possession was given. By her defence the defendant claimed to be entitled to continue in possession as deriving title under her mother within s. 12, sub-s. 1 (*f*), of the Rent Restriction Act, 1920 (1), and/or that she was a member and/or was the only member of her mother's family residing with her at the time of her death, and upon her mother's death intestate (as to her interest in the premises) was, by virtue of s. 12, sub-s. 1 (*g*), of the said Act (2), a "tenant" within the Acts, and as such entitled to remain in possession.

MacKinnon J. gave judgment for the plaintiffs, holding that Mrs. Vincent's right under the Rent Restriction Acts was a purely personal one, and could not be transmitted by her will.

The defendant appealed.

Rayner Goddard K.C. and *L. R. Dunne* for the appellant. The word "tenant" in s. 12 of the Rent Restriction Act, 1920, has reference only to a statutory tenant, and that being so, the tenant has clearly been given something more than a mere personal licence to remain in occupation of the premises. He can maintain trespass: per Scrutton L.J. in *Keeves* v. *Dean*. (3) Moreover, some meaning must be given to the words in s. 12, sub-s. 1 (*f*), of the Act, where it is provided that the expression "tenant" includes "any person from time to time deriving title under the original . . . . tenant." That has been held to include the trustee in bankruptcy of

(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 1 (*f*): "The expressions 'landlord,' 'tenant' . . . . include any person from time to time deriving title under the original landlord, tenant, ..."

(2) Sect. 12, sub-s. 1 (*g*): " . . . . The expression 'tenant' includes the widow of a tenant dying intestate who was residing with him at the time of his death, or, where a tenant dying intestate leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court."

(3) [1924] 1 K. B. 685, 694.

the statutory tenant: *Parkinson* v. *Noel* (1), but it must also include a person taking under the statutory tenant's will. In *Keeves* v. *Dean* (2) it was decided that the statutory tenant cannot assign his right to another person, but an assignment involves a complete break between the landlord and the tenant, which is not the case where the tenant transmits his interest by will. Parliament cannot have intended to limit the words of s. 12, sub-s. 1 (*f*), "any person . . . . deriving title under the original . . . . tenant" to the case of the statutory tenant's trustee in bankruptcy, but that is what is involved if the decision of MacKinnon J. in this case is upheld.

[GREER L.J. referred to s. 5 of the Rent Restrictions Act, 1920, as amended by s. 4 of the Act of 1923, which by para. (*h*) enacts that it is a ground for ejectment if "the tenant without the consent of the landlord has at any time after July 31, 1923, assigned or sublet the whole of the dwelling-house or sublet part of the dwelling-house, the remainder being already sublet."]

That provision has not interfered with the definition of "tenant" in s. 12, sub-s. 1 (*f*), of the Act of 1920. Moreover, Parliament having provided what is to happen in case of the intestacy of the statutory tenant—see s. 12, sub-s. 1 (*g*)—cannot be presumed to have overlooked the more obvious case of the statutory tenant leaving a will; accordingly provision has been made for that by the words "person deriving title under the tenant." It is true that the Court of Appeal of Northern Ireland in *Drury* v. *Johnston* (3) decided against our present contention, but no explanation is there given of the meaning of s. 12, sub-s. 1 (*f*), of the Act of 1920.

If it be correct that the interest of a statutory tenant is not transmissible by will, then Mrs. Vincent died intestate as regards her statutory tenancy, which therefore devolves on the defendant under s. 12, sub-s. 1 (*g*).

[*Collis* v. *Flower* (4) and *Mellows* v. *Low* (5) were also cited.]

A. M. Wilshere for the respondents was not called upon.

(1) [1923] 1 K. B. 117.
(2) [1924] 1 K. B. 685, 694.
(3) [1928] N. I. 25.
(4) [1921] 1 K. B. 409.
(5) [1923] 1 K. B. 522.

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SCRUTTON L.J. If this case had come before us six years ago, we should, after having heard counsel for the respondents, probably have reserved judgment on what would then have been considered a difficult point under the Rent Restriction Acts, but in view of the principles laid down in certain cases to which I shall have to refer we are able to give our decision at once.

When, during the war and the deficiency of house accommodation then experienced, persons, who were contractual tenants, were allowed by the Legislature, after the expiration of their term, to stay on in their houses against the will of their landlords, Parliament, I am afraid, had very little idea what kind of privilege it was thus conferring upon them. As I had occasion to remark in *Roe* v. *Russell* (1), Parliament does not seem to have contemplated what was to happen on the occurrence of some of the most ordinary incidents of life—the death of the statutory tenant leaving a will, his bankruptcy, or his trying to transfer his interest during his life to another person and then quitting the premises. Still less, in the earlier Acts, did Parliament provide what should happen if any of these events occurred. Consequently, when each of these events has happened the Courts have been perplexed by the problem, because the language of the Legislature has afforded very little guidance for its solution. A stage, and a very marked stage, in the development of the Acts was arrived at when we had to consider *Keeves* v. *Dean*. (2) There the broad question was, can a statutory tenant, without the consent of his landlord, assign his whole interest in the premises, whatever it is, to a stranger so as to pass on to him the privilege he has under the Act? Two lines of argument were presented in that case. The first was this, that the effect of the statute is that the tenant who stays in shall stay in on the terms and conditions of his original tenancy, and, as under his original contractual tenancy, he could have assigned, so under the statutory tenancy he was entitled to assign, for he had a kind of property in the tenancy. The other line of argument was

(1) [1928] 2 K. B. 117. (2) [1924] 1 K. B. 685.

that the statutory tenant had no property in it, but a mere personal privilege, and that it was not a term of the tenancy that Parliament granted to him. Consequently, although he could assign when he was a contractual tenant, it did not follow that he could do this when he became a statutory tenant. All the members of the Court in *Keeves* v. *Dean* (1) agreed that the statutory tenant could not assign for value inasmuch as that was expressly prohibited by the Act. On the fundamental question, what was the nature of the interest of the statutory tenant, Bankes L.J. said this (2): "His right is a purely personal one, and as such, unless the statute expressly authorizes him to pass it on to another person, must cease the moment he parts with the possession or dies." Lush J., who was the third judge in that case, said (3): "One necessarily asks oneself what it is that he has got to assign. He has no estate in the premises, that has come to an end, and all that the statute has given him is a purely personal right to be free from disturbance by his landlord." In *Roe* v. *Russell* (4), where it was held that a statutory tenant holding upon terms which do not prohibit sub-letting may sub-let part of the dwelling-house provided the remainder is not already sub-let, Sargant L.J. added the great weight of his opinion to the view expressed by the majority of the Court of Appeal in *Keeves* v. *Dean* (1) when he said (5): "When once the conclusion is reached that the statutory tenant has no estate or property as tenant at all, but has a purely personal right to retain possession of the property, it is difficult to apply to him, as part of the terms and conditions of his former tenancy, rights essentially incidental and due to the possession of property." When in *Keeves* v. *Dean* (1) the Court of Appeal decided that a person could not assign his statutory tenancy during his life they were doing so on the strength of the Acts in force before the Rent Restriction Act of 1923, as the facts giving rise to the action arose before that Act came into operation. The Court was not there referred to the Act of 1923, and, speaking for myself, I was

(1) [1924] 1 K. B. 685.
(2) Ibid. 690.
(3) [1924] 1 K. B. 697.
(4) [1928] 2 K. B. 117.
(5) [1928] 2 K. B. 131.

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not aware of its provisions in which Parliament had made it clear what are the rights of the statutory tenant, for, by the amended s. 5 (*h*), a new cause of ejectment from the statutory tenancy is provided—namely, where "the tenant without the consent of the landlord has at any time after July 31, 1923, assigned or sublet the whole of the dwelling-house or sublet part of the dwelling-house, the remainder being already sublet. . . . ." Parliament therefore in 1923 distinctly enacted that a statutory tenant had not the right during his life to assign the statutory tenancy.

In the present case we are called upon to decide whether a statutory tenant can assign his statutory tenancy by will. He cannot, as I have said, assign it during his life, but can he, during his life, make a disposition to take effect on his death, either by the tenancy passing to his executor, or by leaving it to a beneficiary who may or may not be a member of his family? It is very odd that this point should now arise for the first time after so many years of the Rent Restriction Acts; but having arisen, we have to decide it. The facts here are these: Mrs. Vincent became, by an agreement made in 1913, the yearly tenant of a house in Yeovil at a rental which brought it within the scope of the Acts. In March, 1920, the landlords gave her notice to quit in 1921, but she did not go out, claiming that she was protected by the Acts. She had a daughter who was living with her. In 1903, when statutory tenancies were unheard of, Mrs. Vincent made a will by which she appointed her daughter her executor and sole beneficiary. At the date of her death in August, 1928, Mrs. Vincent was the statutory tenant of the premises, and Miss Vincent was her executor and sole beneficiary; and the question arose, could Mrs. Vincent by her will assign her right and interest in the premises to her daughter? The answer to that question must depend upon the nature of the interest which the tenant obtains after the determination of the contractural tenancy, by virtue of the Acts. We are bound by the view of the majority of the Court in *Keeves* v. *Dean* (1), concurred in by the majority of

(1) [1924] 1 K. B. 685.

the Court in *Roe* v. *Russell* (1), to hold, in the language of Sargant L.J. in the last mentioned case which I have already quoted, that "the statutory tenant has no estate or property as tenant at all, but has a purely personal right to retain possession of the property." Such a right does not confer upon the statutory tenant the privilege of assigning that personal right to some one else during his life, and as he cannot do that, neither can he, during his life, assign it to take effect upon his death. It seems to me impossible to find any reasonable ground for saying to the statutory tenant "You may not assign to A. B. during your life but you may leave it as a legacy to A. B." It is true that there is almost an equal absurdity either way, for although there is nothing in the Acts up to 1920 regarding what is to happen on the death of a tenant intestate, the Act of that year—s. 12, sub-s. 1 (*g*)—defined "tenant" as including "the widow of a tenant dying intestate who was residing with him at the time of his death, or, where a tenant dying intestate leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court." That is an express statutory provision, from which it follows that if Mrs. Vincent, instead of making a will, had died intestate while her daughter was living with her in the house, the daughter would have become the statutory tenant; but she would only have become so because the statute in terms has so enacted. The statute has said nothing about leaving property by will, and as Parliament has said that the statutory tenant shall not, without the consent of the landlord, assign the dwelling-house during his life, it follows that he cannot assign it by will. We can only construe these Acts as we find them, and my view, as the result of the authorities, is that the right conferred upon the statutory tenant—in the absence of any express provision altering it in any particular case—is a purely personal right with which he cannot deal. Possibly this view may render it necessary some day to reconsider previous decisions as to the position of executors, administrators

(1) [1928] 2 K. B. 117.

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and trustees in bankruptcy of statutory tenants; it is unnecessary however to do so now. In this case it is only necessary for us to say that a statutory tenant cannot leave by will his right or interest, or however it may be described, in the statutory tenancy. The appeal must accordingly be dismissed.

GREER L.J. I agree. There seems to be no end to the conundrums suggested by the Rent Restriction Acts, and I suppose that there will be no end to them until those Acts disappear from the statute book. But as questions come before us, however difficult it may be to reconcile various sections of the Acts and the various authorities, we have to decide them. In this case the question is whether a person who for convenience is called a statutory tenant is entitled by will to dispose of such right as he has as statutory tenant to a legatee, or to his executor whom he nominates, in such a way that the legatee or executor obtains the same right of possession and the same right to resist an order for possession by the landlord as existed during the occupation of the premises by the deceased. It will be remembered that Parliament, by s. 5 of the Act of 1920, restricted the power of the Court to order possession in favour of the landlord as against the tenant when the contractual tenancy had come to an end. Parliament might have said: "There shall be substituted for the existing tenancy a tenancy on different terms," and, if that had been done, the statutory tenancy would have been a tenancy within the true meaning of the word, and would have been capable of assignment inter vivos, as well as devolution by will. Parliament did not take that course; it restricted the power of the Court to order possession so long as certain facts in reference to the behaviour of the tenant continued to exist. It might well be that apart from decisions on the subject and apart from various amendments the original Act might have been taken as meaning that a real tenancy was created by the rights given to the tenant, or rather by the restrictions imposed upon the landlord. Having regard to the decision in *Keeves*

v. *Dean* (1), however, it is impossible to take that view. There the Court had to say whether an assignment of the statutory right, whatever that was, inter vivos, could be effective. The Court had to consider the definition of "tenant" contained in s. 12, sub-s. 1 (*f*), of the Act of 1920, which says that it includes "any person from time to time deriving title under the original . . . . tenant;" and if in s. 5 a "tenant" does not mean a tenant in the true sense, but a person who, but for the Acts, would be a mere trespasser, one would have been inclined to read "tenant" in s. 12, sub-s. 1 (*f*), as referring to the same kind of person; but having regard to the decision in *Keeves* v. *Dean* (1) I do not think it is possible to read s. 12, sub-s. 1 (*f*), as referring to a person other than one who derives title under the original tenant during the existence of the original tenant's tenancy, that is to say, before he has ceased to hold under his common law contract. Curiously enough s. 12, sub-s. 1 (*g*), under the expression "tenant" includes "the widow of a tenant dying intestate who was residing with him at the time of his death, or, where a tenant dying intestate leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court." If we were to read that definition as including a person deriving title from the original tenant, then in the case of intestacy there might be one or two next of kin other than the widow, who would be tenants under clause (*f*), and the widow under clause (*g*), and a most awkward situation would be created. I can only read clause (*f*) as confined to persons who derive title from the holder of the tenancy while his estate under the original contract of tenancy subsists. That is the only way that we can read the decision in *Keeves* v. *Dean* (1), because clause (*f*), if interpreted literally as applicable to a statutory tenancy, would include an assignee of the statutory tenancy just as much as an executor or legatee of the tenant. The decision in *Keeves* v. *Dean* (1), although the reasons given for it differ, is binding upon us, especially as it has been accepted

(1) [1924] 1 K. B. 685.

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in *Roe* v. *Russell*. (1) The result is that there is no right given by the Acts to the tenant which he can assign inter vivos or leave by will. If his right is deemed to be a personal right to occupy the premises it is inconceivable that his executor can take anything, because the personal right cannot exist after the statutory tenant has ceased to exist himself.

One problem that may arise for this Court, having regard to the decisions in *Keeves* v. *Dean* (2) and *Roe* v. *Russell* (1), is whether I was right when I decided in *Parkinson* v. *Noel* (3) that the statutory tenant's right passed to his trustee in bankruptcy. I do not think that our present decision is inconsistent with the view I there took, for it was not decided in that case that the trustee in bankruptcy had a right to take possession of and live in the premises and resist in his own name an order of the Court to deliver up possession. The ground for the decision was that the landlord was restricted from taking possession of the premises so long as the tenant was in them, and the other conditions were complied with. That right was one which might be made available in the hands of the trustee in bankruptcy, for his right to say to the landlord "You cannot turn out the bankrupt" could be turned into money for the benefit of the creditors. I see nothing in the Acts to prevent that.

I desire to add a word on the last point made by Mr. Rayner Goddard in his argument—namely, that if the statutory tenancy cannot be disposed of as property, Mrs. Vincent must be taken to have died intestate. That is a very ingenious argument, but it seems to me to be impossible to say that a person who has disposed of all her property by will can be an "intestate" within the meaning of these Acts.

I agree that the appeal should be dismissed.

SANKEY L.J. I agree that the question for determination is really concluded by the reasoning of *Keeves* v. *Dean*. (2)

(1) [1928] 2 K. B. 117. (2) [1924] 1 K. B. 685.
(3) [1923] 1 K. B. 117.

Referring to the position of a statutory tenant Bankes L.J. there said (1): "His right is a purely personal one, and, as such, unless the statute expressly authorizes him to pass it on to another person, must cease the moment he parts with the possession or dies." That reasoning was accepted by Sargant L.J. in *Roe* v. *Russell* (2), where he said (3): "When once the conclusion is reached that the statutory tenant has no estate or property as tenant at all, but has a purely personal right to retain possession of the property, it is difficult to apply to him, as part of the terms and conditions of his former tenancy, rights essentially incidental and due to the possession of property." It is to be observed that the facts in *Collis* v. *Flower* (4) and *Mellows* v. *Low* (5), to which we were referred, were different from those in the present case, for in each of those cases a contractual tenancy was in existence between the landlord and tenant at the date of the tenant's death. In this case the statutory tenant's right was purely a personal one which could not be transmitted by will to any one. In my opinion MacKinnon J.'s decision was correct and the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Langlois, Harding & Co., for Mayo & Son, Yeovil.*

Solicitors for respondents: *Gregory, Rowcliffe & Co., for Watts, Moore & Bradford, Yeovil.*

(1) [1924] 1 K. B. 690.
(2) [1928] 2 K. B. 117.
(3) [1928] 2 K. B. 131.
(4) [1921] 1 K. B. 409.
(5) [1923] 1 K. B. 522.

J. S. H.

K. B. D. 1928
Nov. 14, 15; *Dec.* 20.
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Feb. 19.

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Ex parte GEORGE AND STAMFORD HOTELS, LIMITED.

Licensing—Provisional Grant—Confirming Authority—Conditions—Further Meeting—No Opportunity to Parties to appear—Jurisdiction—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 & 1 *Geo.* 5, *c.* 24), *s.* 14—*Licensing Rules*, 1910, *r.* 47.

An application was made to licensing justices for a new licence to premises at S. The application was opposed, but the licence was granted unconditionally. The confirming authority, after hearing the case for and against the application, confirmed the licence subject to two conditions. Notice of this decision was given to the licensing justices, who told the confirming authority that they did not agree to the second condition. At a further meeting of the confirming authority it was decided to confirm the grant subject only to the first condition. No notice was given to the parties, and they had no opportunity of appearing at this meeting and arguing as to the variation of the conditions. A rule nisi for certiorari to quash the order of the confirming authority was obtained on the ground that the authority acted without jurisdiction in confirming the licence:—

Held (by Lord Hewart C.J. and Acton J.; Avory J. dissenting), that the confirming authority had not exceeded their jurisdiction and that the rule must be discharged.

Held, also, that the fact that the confirming authority were differently constituted at the second meeting owing to other members of the committee being present and voting did not invalidate the confirmation of the licence.

On appeal:—

Held (reversing the decision of the Divisional Court), that as soon as the confirming authority had ascertained the views of the licensing justices it was their duty to sit judicially in the presence of the parties interested to determine whether or not the alterations made by the licensing justices should be accepted.

Held, therefore, that as this had not been done, the order made by the confirming authority was a nullity, and the matter must go back to them to hear and determine it in the presence of the parties interested.

Held, also, that the meeting of the confirming authority ought to be constituted of the same members as were present at the original meeting.

Rule Nisi for certiorari.

On March 13, 1926, a new licence of the Haycock Hotel, Stibbington, in the county of Huntingdon, was granted by licensing justices for five-and-a-quarter years. The licence was unconditional, and the confirming authority, after hearing

both sides, confirmed the licence subject to two conditions: (*a*) "No bar to be permitted"; (*b*) "intoxicating liquors to be supplied only to persons residing in the hotel and their guests, and to persons partaking of meals." The decision of the confirming authority was communicated to the licensing justices under r. 47 of the Licensing Rules, 1910, but the justices declined to agree to the second condition, and so informed the confirming authority. A further meeting of the confirming authority was held on May 16, 1928, when it was decided to confirm the grant of the licence subject only to the first condition.

No notice was given to the parties of the further meeting, and they had no opportunity of being heard on the question of verifying the conditions.

A rule nisi for certiorari was granted calling on the confirming authority to show cause why the order of the confirming authority dated May 16, 1928, should not be quashed on the ground that that body had acted without jurisdiction in confirming the licence.

St. John Raikes K.C. and *F. J. Tucker* showed cause for the confirming authority.

Montgomery K.C. and *Sidney Lamb* for the licensee.

Whiteley K.C. and *Willway* in support of the rule.

[The arguments sufficiently appear from the considered judgments of the Court.]

Cur. adv. vult.

Dec. 20. The judgments of the Court were delivered in the following order:—

AVORY J. I am unable to concur in the conclusion at which the Lord Chief Justice and Acton J. have arrived in this case; therefore I express my opinion with diffidence.

On March 13, 1928, a new licence to premises known as the Haycock Hotel, Stibbington, in the county of Huntingdon, was granted by the licensing justices for a term of five-and-a-quarter years, and the monopoly value, fixed at 125*l.*, was to

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be paid by instalments. The application was opposed on behalf of the George and Stamford Hotels, Ld., and on behalf of other persons, but was granted unconditionally. On April 25, 1928, the confirming authority, being the county licensing committee of the county of Huntingdon, after hearing the applicant and the opposition, announced that the grant of the licence would be confirmed, providing the following conditions were attached: (*a*) No bar to be permitted. (*b*) Intoxicating liquors only to be supplied to persons residing in the hotel and their guests, and to persons partaking of meals. This decision of the confirming authority being communicated to the licensing justices under r. 47 of the Licensing Rules, 1910, they declined to agree to the second condition, and so informed the confirming authority. Thereupon a further meeting of the confirming authority appears to have been held on May 16 at which it was decided to confirm the grant of the licence, subject only to the first condition—namely, "No bar to be permitted." No notice was given to the applicant or the opposition of this further meeting of the confirming authority, and no opportunity given to either of them to be further heard on the question of the variation of the conditions. Under these circumstances a rule nisi was granted calling upon the confirming authority to show cause why a writ of certiorari should not issue to remove into this Court the order made by the confirming authority on May 16, 1928, with a view to its being quashed on the ground that the confirming authority acted without jurisdiction in confirming the licence.

This question as to the jurisdiction of the confirming authority has to be determined as one of principle and not merely on the facts of this particular case. It may be that in this case if notice had been given, and both the applicant for the licence and the opponents had been heard before the final decision was given, the result would have been the same; but it is easy to imagine cases where substantial alterations may have been made in the proposed conditions attached to the licence, either by the licensing justices or by the confirming authority, upon which both the applicant

and the opponents might desire to be heard before the final decision is arrived at.

In determining this question it is important to bear in mind the distinction between the position of the licensing justices and the confirming authority, which is a committee of the quarter sessions and sits as a court, and is entitled to act only upon evidence given upon oath: *Rex* v. *Sunderland Justices* (1) and *Rex* v. *Jackson* (2); and while the statute provides that any alteration in the conditions must be submitted to the licensing justices for their approval, the ultimate decision rests with the confirming authority, and until that decision is arrived at the licence has no validity. It appears to me, therefore, that in any case where the licensing justices have not agreed to the conditions proposed by the confirming authority, any and every meeting of the confirming authority subsequently held, at which a decision to confirm or refuse the confirmation of the licence is to be given, should be governed by the same procedure that regulates the first meeting of which both parties have notice, and at which both are entitled to be heard. In *Rex* v. *Jackson* (2) it appears from the report that, at the further meeting of the confirming authority, after the licensing justices had refused to agree to the proposal of the authority, counsel for the applicant was heard, and presumably notice of the meeting had been given, and upon the application for the mandamus to the confirming authority to hold a further meeting, it did not occur to any one in either court to suggest that the difference was to be adjusted in conference between the licensing justices and the confirming authority in the absence of the parties.

The applicants for this rule rely also on the ground that the constitution of the committee which finally determined the matter was not the same as that which heard and considered it at the first hearing, and though, as at present advised, I should not be prepared to hold that the proceedings were thereby vitiated, if the parties had had the opportunity of

(1) [1901] 2 K. B. 357.
(2) (1906) 96 L. T. 77; 71 J. P. 25; 23 Times L. R. 128.

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being heard, yet the fact that the tribunal at the final hearing was not the same in constitution affords a further reason for holding that the final decision should not have been arrived at in the absence of the parties and without giving them the opportunity of being heard; and the decision of this Court in *Rex* v. *Surrey Licensing Committee. Ex parte Madden* (1) supports this view.

For these reasons I think that the rule should be made absolute.

ACTON J. It is with diffidence that I have arrived at a different conclusion upon this case.

Two substantive points were argued in support of the rule: (1.) That the confirming authority having intimated their willingness to confirm, subject to conditions (*a*) and (*b*), and the licensing justices having consented to (*a*) but not to (*b*), it thereupon became obligatory upon the confirming authority to give notice both to the applicant and the opposition, and to hold a further meeting, at which an opportunity should be given both to the applicant and the opposition of being further heard before the licence was confirmed. (2.) That the members of the confirming authority who confirmed the licence must include no member who had not taken part in the hearing of April 25. These points should be taken separately.

Upon the first point it is to be observed that there is nothing in the Act of 1910, or in r. 47 of the Licensing Rules, 1910, which expressly imposes upon the confirming authority (after once fully hearing upon notice to the applicant and the opposition the application for confirmation) any duty or obligation to give, in any event, a further notice or notices, or to afford either applicant or opposition an opportunity of being further heard by them. Such obligation, if any, cannot therefore arise, save by implication or as an inference from the intention or effect of the scheme of legislation provided. The question accordingly is: Does any such obligation so arise in the absence of any express provision in the Act or Rules?

(1) (1916) Unreported: see the Brewery Trade Review (1914) 392.

In my view it is important to see what it is that happens at and after the hearing of the application for confirmation. The confirming authority hear fully evidence and arguments on behalf of the applicant and the opposition. If in the result they decide to refuse the licence, or to confirm it either without any condition at all, if none has been imposed, or subject only to such conditions as have already been imposed by the licensing justices without more, no difficulty arises. They may however with the consent of the licensing justices, but not otherwise, vary the conditions attached to the licence by the licensing justices. If they decide that this is expedient, the variations which commend themselves to the confirming authority are aptly described as "proposed" variations, for at this stage the powers of the confirming authority are indeed limited to "proposing." Whether that which they propose is to be consented to or rejected then depends upon the licensing justices to whom that question is submitted.

If the argument had been that the licensing justices were in such an event under obligation to the applicant and the opposition to give them a further hearing, in order that they might advance further arguments or evidence whether the "proposals" of the confirming authority should be consented to or rejected by the licensing justices, it would have been to me at least an intelligible argument: for upon this issue one can readily understand that either side might reasonably suppose it desirable that they should be heard, since there may be arguments or evidence relating to the "proposed" variations which the licensing justices have not heard or considered at all, or indeed may not have had any opportunity of hearing and considering until the variations are in fact formulated and "proposed." As I understand however no such argument is advanced. It appeared to be assumed in the argument that the licensing justices may consider the "proposed" variations and decide to consent to them or reject them without further hearing either applicant or opposition.

The next stage is that which is reached when the licensing justices have decided this matter. At this stage it is

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apparent that three contingencies may arise—namely: (1.) The licensing justices may consent to the variation or variations "proposed" by the confirming authority without reservation. (2.) The licensing justices may reject the variation or variations proposed by the confirming authority altogether. (3.) The licensing justices may of any two or more variations "proposed" by the confirming authority consent to one or more, and reject another or others. It is with this third contingency that the present case is concerned.

The argument in support of the rule then is, that in the first or second contingency there is no obligation upon the confirming authority to give the applicant or opposition a further hearing upon notice, but that in the third contingency there is such an obligation. I am unable to follow this argument. I am unable to see why, out of the various stages through which the proceedings relating to the confirmation of a licence may pass after the original hearing by the confirmation authority of the applicant and opposition on an application for confirmation, this one stage should be singled out as that at which alone there arises an obligation or duty to give the parties a further hearing. I could understand without accepting the contention, that as each stage or new situation is reached there arises some duty or obligation to give the parties a further hearing, because at each stage a situation, new to a greater or less extent, is developed; but not that this arises only if the licensing justices accept a part and reject the rest of the "proposed" variations. In such an event I cannot see that at a further hearing either the applicant or the opposition could do anything more than repeat before the confirming authority the whole or some part of that which upon the original hearing induced the confirming authority to determine to confirm the licence subject only to the "proposal" of certain variations. I think the right view is this: Just as the licensing justices may consider and decide among themselves whether to accept or reject, wholly or in part, the proposed variations, and communicate the result to the confirming authority without any further hearing, so in their turn the confirming

authority, upon receipt of that communication, may consider and determine among themselves whether they will confirm or refuse the licence applied for with such conditions attached as are now attached to it by the determination of the licensing justices. The determination of each question in its turn, first by the licensing justices, and secondly, by the confirming authority, is a matter dependent merely upon the exercise of its own discretion by each administrative tribunal in its turn upon materials which must be taken to have already been exhaustively submitted to their consideration by the parties interested in obtaining or resisting the grant of the licence. The authorities cited, *Rex* v. *Jackson* (1) and *Rex* v. *Surrey Licensing Committee. Ex parte Madden* (2), do not seem to me to be adverse to this conclusion; nor do I think that the reasons for arriving at this conclusion are invalidated by the fact that the confirming authority, being a committee of quarter sessions, sit as a court of quarter sessions to hear the applications for confirmation of licences.

As to the second point, I observe with gratification that Avory J. is of opinion that this of itself would not vitiate the action of the confirming authority. It is not disputed that a quorum of the members of that authority who actually heard the application for confirmation were present on May 16, and it is clear that, upon any view of the facts, a clear majority of those who had been present both on April 28 and May 16 voted in favour of confirming the licence in question subject to the one "proposed" variation to which the licensing justices had consented meanwhile. In these circumstances it cannot, in my opinion, be successfully contended that the mere fact that other members of the committee were present and voted invalidated the confirmation of the licence.

For these reasons I am of opinion that the rule should be discharged.

LORD HEWART C.J. In this case it is with respect and regret that I find myself unable to concur in the judgment

(1) 96 L. T. 77; 71 J. P. 25. (2) Unreported.

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of Avory J. I have had the opportunity of reading and considering the judgment which has just been delivered by Acton J. With that judgment I concur. I need only add that, as it seems to me, those who oppose a licence absolutely, and also oppose it if subject to two conditions, may be taken to oppose it if subject to one condition. It is not that they have not been heard; they have been heard. I think therefore that this rule ought to be discharged.

Rule discharged.

F. P. F.

The applicants (the George and Stamford Hotels, Ld.) appealed. The appeal was heard on February 19, 1929.

Whiteley K.C. and *Willway* for the appellants.

F. J. Tucker (*St. John Raikes K.C.* with him) for the confirming authority.

Montgomery K.C. and *Sidney Lamb* for the licensee.

The arguments sufficiently appear from the judgments.

LORD HANWORTH M.R. This is an appeal from the Divisional Court, who refused to make absolute a rule nisi which had been obtained on June 21 last for a certiorari to bring up a certain order made by the confirming authority of the county of Huntingdon on May 16, confirming a new licence which had been granted to enable one Cyril James Allday, of Fotheringhay, to hold an excise licence to sell at premises at Stibbington, spirituous and intoxicating liquors. The case was heard before the Divisional Court and judgment was given on December 20 last, a judgment in which the Lord Chief Justice and Acton J. held that the rule nisi ought not to be made absolute, while Avory J., differing from his colleagues, thought the rule nisi should be made absolute.

The question which arises is an interesting one, and it arises on these facts: an application was made by Cyril James Allday to hold an excise licence at a hotel which is called the Haycock on the Huntingdonshire side of the Nene at Wansford, in fact the village I think is called Stibbington.

That was an application for a new licence. It was an application that a licence should be granted to a house which, some thirty-five years ago, had held a licence, but at which the licence had been abandoned, and this was a fresh application in order that there might be a new hotel opened on the Great North Road at the point of its passage through Wansford. The matter was heard by the licensing justices at their proper licensing meeting, and they granted the licence. The matter then had to go, under sections which I will deal with in a moment, before the confirming authority, and they imposed two conditions : (*a*) that there should be no bar at this hotel, and (*b*) that the sale of intoxicating liquors should be made only to persons resident in the hotel. That was the decision of the confirming authority on April 25. In consequence of those conditions having been imposed, the matter had to go back to the licensing justices, and on May 8 they refused to accept the second condition and left standing only the condition that there should be no bar at the hotel. Thereupon the matter was once more brought before the confirming authority and, on May 16, that confirming authority accepted the deletion of the second condition which they had imposed and were content to grant a licence with the sole condition that there should be no bar. In consequence the official stamp of the confirming authority was affixed to the licence, and that enabled the holder to obtain the usual customs licence for the sale of liquors, and he has been carrying on the hotel and selling liquors under the authority so confirmed.

It appears that on May 16, although we were told the confirming authority made the announcement in Court that they would accept the decision of the licensing justices, the parties who had been before the confirming authority on April 25 were not given notice of the further meeting on May 16, and they did not attend it ; no one was there at the hearing or to take part in any hearing on May 16. The result was that the decision reached by the confirming authority was reached at a meeting of that authority alone, and confirmation was given on that day in the absence of parties

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who had previously been before them. More than that, it appears that there were two or three justices who attended on May 16 who had not attended on April 25, but there was a sufficiently large number of justices who had been present and heard the evidence on April 25, to justify the decision which was reached on May 16 as being one in which a majority of those who had taken part on April 25 were present.

A rule nisi for a certiorari was asked for and obtained on June 21 in consequence of the objections which were taken by the opponents to this new licence, that is the George and Stamford Hotels, Ld., and the objection was taken that in fact the proceedings of the justices on May 16 were irregular, in that the parties before the Court on April 25 were not heard, and also on the ground that there were present on May 16 justices who were not qualified to take any part in the deliberations of the confirming authority on that date. The rule nisi was granted and was dealt with in the manner I have already stated by the Divisional Court, and it now comes before this Court by way of appeal.

It is necessary to deal with some of the sections in the Licensing (Consolidation) Act, 1910, to which our attention has been called. First of all, it is provided by s. 2 of that Act, that the licensing justices are the justices acting in and for the petty sessional division, and the confirming authority are quarter sessions. Then it is provided by s. 6, sub-s. 2, that the confirming authority of a county, that is quarter sessions, may delegate any of their powers and duties under this Act to a committee and shall so delegate their power of confirming the grant of a new justices' licence; hence, the confirming authority here was a committee formed out of the justices of quarter sessions. Then the procedure in respect of a new licence is this: under s. 12, sub-s. 2, the grant of a new justices' licence by the licensing justices shall not be valid unless it is confirmed by the confirming authority, and by s. 13, sub-s. 2, it is provided that any person who has appeared before the licensing justices and opposed the grant of a new justices' licence, and no other person, may appear and oppose the confirmation of the grant by the confirming

authority; and finally, by s. 14, it is laid down that the licensing justices on the grant of a new licence must impose a condition as to monopoly value, and they may attach to the grant of the licence, such conditions both as to the payments to be made and the tenure of the licence, and as to any other matters as they think proper in the interests of the public. By sub-s. 5 of that section: "On the confirmation of a new justices' on-licence, the confirming authority may, with the consent of the justices authorised to grant the licence, vary any conditions attached to the licence under the provisions of this section."

It will be observed in relation to that matter that one condition at least must be imposed and therefore the confirming authority may vary the conditions attached, of which there must be one, to the licence, and they may, therefore, suggest that further conditions should be imposed, but the structure of sub-s. 5 is important. It provides: "On the confirmation of a new justices' on-licence, the confirming authority may, with the consent of the justices authorised to grant the licence, vary any condition," and under the Licensing Rules, 1910, it is provided by r. 47: (1.) that the confirming authority "shall send to the justices authorised to grant the licence a statement of the variations proposed by them, together with their reasons for the proposed variations," and by sub-r. 2: "As soon as may be after the receipt of such statement the justices shall hold a meeting, of which special notice shall be given to each acting justice, for the purpose of considering, and if they think fit, consenting to the proposed variations", and then under sub-r. 3 "the justices shall send notice of their decision with respect to the proposed variations, as soon as may be, to the confirming authority." When Form 20 is looked at, it is clear that the statement of the variations in conditions proposed by the confirming authority is to be sent to the justices authorized to grant new licences in the licensing district. Those sections, rules and form appear to lay down the procedure.

The primary duty of deciding whether there shall be a new licence or not is for the licensing justices, but their decision

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is not effective and complete unless and until the confirming authority have confirmed the new licence granted by the justices. When confirming the new licence, the confirming authority may impose fresh conditions with the consent of the licensing justices. Those proposals for new conditions must be submitted to the licensing justices, and the licensing justices have a right to determine whether or not they will assent to those conditions, and then the matter must go back again with the answer of the licensing justices to the confirming authority.

I think at the outset it is very important to remember and observe that the licensing justices are an exclusive body who are dealing with the applications. I say that, not overlooking the duty that they have to hear the parties who come before them, and the like : that they have many duties which are, in their nature, judicial ; but a distinction has often been drawn between the duty of the licensing authority as being an executive body and the judicial duties which are imposed upon the court of quarter sessions of which this confirming authority are a committee, and it is clear from cases which have been decided, that the confirming authority are a judicial body and must exercise their functions judicially. Accordingly they must hear the parties who appear before them, they must hear both sides and they must give an opportunity for applications to be made by those parties who are concerned, in the Court in which they are sitting judicially. What happened in the present case was this : That the confirming authority imposed two conditions ; on reference to the licensing justices, one of those conditions was removed, it was not assented to. What was the effect upon the confirming authority ? It appears to me that they must then reconsider the position ; they must decide whether, when only a proportion of their proposed variation is accepted, they will adhere to the proposed confirmation by them. In fact, what they had to do on May 16 was once more to reconsider the application for confirmation in the light of the fact that the licensing justices had not assented to one of the conditions which they had thought proper to suggest. It has been argued in some of the cases

and before us here to-day, that what the confirming authority did on May 16 was merely to come to a final conclusion on the order they had made on April 25, and that their proceedings may be treated in this way: that a final order has been made by them confirming the licence of April 25, but attaching to that confirmation, which was to be of standing effect, two conditions, which, if assented to, could be added to the confirmation, but which, if not assented to, might pass away, and did not in any way affect the confirmation granted. It appears to me that that is not a right conclusion to come to either upon the view that is indicated by the sections of the Act or upon the facts. In my opinion, having regard to s. 14, the confirming authority must submit the proposed conditions to the justices, and when they have learned from the justices what their view is of the conditions, they ought to go on with the hearing of the application before them, and come to a conclusion on the new and altered circumstances —namely, the refusal of one of the conditions—whether or not they will decide finally to confirm.

That view seems to follow from the decision of the Court of Appeal in *Rex* v. *Jackson*. (1) In that case there was a recommendation or condition suggested by the confirming body, that a monopoly value which had been imposed by the licensing justices, of 2250*l*., should be raised to 5000*l*., and a minute was referred to under which that condition was imposed, and it read as follows: "It is ordered that the licence be confirmed and that the conditions attached to the licence under the provisions of s. 4 of the Licensing Act, 1904, be, with the consent of the justices authorised to grant the licence, varied by fixing the monopoly value at 5000*l*." It was argued that that was an out and out confirmation, and inasmuch as the amount of the monopoly value was not assented to by the justices, still the confirmation stood. Collins M.R. said (2): "It seems to me that we should be putting too technical a construction upon what is recorded in the minute of the confirming authority if we were to hold that it is an absolute order of confirmation followed by an abortive condition which

(1) 96 L. T. 77. (2) 96 L. T. 83.

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may be rejected, so that the confirmation may be treated as valid and the condition as a nullity. It seems to me that the fair reading of the minute is that the confirmation is conditional upon the monopoly value being increased to the amount proposed by the confirming authority, and until that condition is fulfilled there has in fact been no confirmation." Cozens-Hardy L.J. said (1): "It seems to me to follow logically that there can be no confirmation of a grant so long as there is a difference of opinion between the licensing justices and the confirming authority as to the amount of the monopoly value." Those observations appear to apply to this case, and I agree with them.

It seems to me that it is impossible to say that the confirming authority, which annexed certain conditions to their confirmation of the licence, can be held bound by that confirmation if and when those conditions are struck out. It appears to me that the licensing justices and the confirming authority must get into line before the matter is concluded, in other words, that the so-called confirmation on May 16, was not an absolute confirmation, because the confirming authority had to view the new situation created by the refusal of the licensing justices on May 8 to accept the two conditions imposed by them on April 25. I think Mr. Maule's affidavit makes it clear from what happened on April 25 that the confirming authority themselves recognized the importance of a further sitting. I am reading para. 6 of the affidavit: "Immediately after the Court had announced their views as clerk of the authority I pointed out to the committee and to all parties concerned that the conditions sought to be inserted in the licence as drafted by Mr. Cecil Whiteley himself and handed in to the committee required first of all to be submitted to the Norman Cross justices for their approval or otherwise stating as I did at the same time that if the justices concurred with the views of the confirming authority in their entirety no further meeting would become necessitated, in the alternative should the justices decline to the imposition of the conditions suggested for their consideration it would be incumbent on the committee to

(1) 96 L. T. 83.

meet again, and counsel and the other parties openly concurred in this decision." Now what is the meaning of meeting again? It is the confirming authority that would have to meet again. That confirming authority, as I have pointed out, is a judicial body, and if it has a meeting again, it must sit as a judicial body for the purpose of adjudicating on the matter judicially. It appears to me that although that body, when they met on May 16, had complete seisin of their own proceedings and could determine whether they would hear anything more from counsel on any particular point, yet they had to sit as a judicial body; they had not merely to sit as a body of justices in the justices' room, and come to a decision without sitting and hearing and determining the matter as a Court.

Those being the facts in this case, it appears to me that the sitting on May 16 was a sitting at which a conclusion was reached which ought not to have been reached, in the sense that it was too early for the confirming authority to issue a licence. They ought to have heard, as a judicial body, anything more that was to be said on the matter, if they thought there was anything more to be said which was material. If they determined that there was not, then, sitting judicially, they could come to the same conclusion which they did reach; but that ought to be after the opportunity had been given for those parties who were interested, at least to make an application to be heard; whether that was granted, or not, would be for the discretion of the confirming Court to decide. Under these circumstances it appears to us that the order that was made was in effect a nullity: that the confirming justices had not taken the steps by way of issuing notices and the like which it was necessary for them to do in order to come to a final determination, but that the matter has not passed out of their hands: that this order that they purported to issue is in effect a nullity, but they are still seised of the matter, and as a confirming authority and sitting judicially, they will be entitled again to proceed with the question of this confirmation now that they know that the justices will accept only one condition and not both. The result will be that these confirming

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justices must once more sit and come to a conclusion. We think that the application for a certiorari was a right one, and that it was necessary if the order was to be set aside to apply for a certiorari.

One more point I must deal with, and that is the question of the justices who had not sat when evidence was taken on April 25, but who appeared at the meeting of May 16. We think that the confirming authority ought to be composed in the same way on both occasions: that new justices who have not heard the evidence given ought not to attend. It is quite possible that all the justices who heard the case and the evidence on April 25 may not be able to attend on any further hearing, but however that may be, those justices who did hear the case must not be joined by other justices who had not heard the case for the purpose of reaching a decision, on this question of confirmation.

The result will be that this appeal will be allowed with costs, because we think that this appellant had to come to this Court. With regard to the costs of the previous proceedings, we will hear what Mr. Montgomery has to say about them; and the order will be for the rule to be made absolute, but a clear indication is given by the Court to the confirming justices that they must now proceed to hear the matter, and determine whether or not they will confirm the single condition accepted by the licensing justices.

GREER L.J. I agree, and have very few words to add. In order to complete the last sentence of my Lord's judgment, I should like to add that the application to the confirming authority when it is renewed must be after notice to the parties, and their decision must be made not merely after notice to the parties, but also after hearing any evidence and any argument that may be presented to them by either of the parties.

This case may be stated quite shortly by me, having regard to the fact that my Lord has called attention to the relevant sections of the Act of Parliament which deal with the matter we have to consider. Mr. Whiteley has taken two points

on behalf of the appellants. He says in the first place this matter was finally disposed of on April 25; the confirming authority on that date decided, according to his argument, that they would not confirm this licence unless two conditions were accepted by the licensing justices. If I had come to the conclusion that that was the right construction to put upon the evidence which is before us I should have thought it was a sound argument, but in my judgment, what really happened was that the confirming authority in the first place when they gave what is called their decision, misunderstood what they were doing, and they said: "We will grant the licence on these two conditions." They had no power to grant licences, all they had to consider was whether they could confirm a licence which was already granted, and to suggest, if they did confirm it, modifications in any conditions laid down by the licensing justices; and they thereupon suggested that there should be two conditions considered by the licensing justices before the licence should be deemed to be confirmed. The licensing justices considered those two conditions, and agreed that they would grant the licence with one of those conditions, but refused to attach the other. Then, what was the condition of that licence? It was a licence which was unconfirmed, which was being put forward by the licensing justices with one condition, and how could it be dealt with by the confirming authority, except, when they received notice of what the licensing justices were doing, by considering and considering fully and judicially, whether they should confirm the licence with that one condition only? It seems to me that under those circumstances those who opposed the licence were entitled to be heard by the confirming authority before they finally decided whether they would confirm the licence with that one condition alone, they having previously intimated that their prima facie view was that there ought to be two conditions. I think a judicial authority deciding that question behind the backs of the parties interested, without giving them an opportunity of being heard, was doing that which it was not entitled to do, and that the Court ought to do what Avory J., in the Court

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below, thought should be done—namely, bring the order into this Court and set it aside—quash the order. I agree with my Lord that it does not finally determine the rights of the parties in this matter; it only gets rid of an order that ought not to have been made, and leaves it for the confirming authority to decide, after giving the parties interested an opportunity of appearing before them and stating their respective cases, what order they ought to make having regard to the decision of the licensing justices. For these reasons, I agree that this appeal should be allowed and allowed with costs, because, unfortunately, the appellants had to come here to get what they were entitled to.

ROMER J. I agree. As we are differing from the view of the majority of the Divisional Court, I think it is only right that I should express, quite shortly, my own view. It is quite unnecessary for me to recapitulate the facts, but, in my opinion, it is not possible to say that confirmation here was refused unless the two conditions that have been mentioned were imposed. In the first place, speaking entirely for myself, I doubt very much whether a confirming authority have any power to make a conditional refusal. It seems to me from the Act, they must either confirm or refuse to confirm, and the only power they have to impose conditions, is the power given by sub-s. 5 of s. 14, and that power is one of varying conditions on the confirmation of a new justices' licence. In the second place, the confirming authority, in my opinion, in the present case, did not purport to do any such thing; what they did purport to do was to confirm the licence subject to two conditions. They did not express any view one way or the other as to what they would do if those conditions did not receive the assent of the licensing justices. I am of opinion that where a confirming authority desire to vary the conditions imposed by the licensing justices, they ought to ascertain, before making any order, whether the licensing justices consent to such variation or not. This, it appears to me, is the true effect of sub-s. 5 when properly construed, and it is made still clearer by r. 47 of the Licensing

Rules of 1910. If the licensing justices do not consent, the confirming authority must then hold a further meeting to decide whether in the altered circumstances, or rather in the new circumstances of the licensing justices not consenting, they will confirm the order or not. This was not done in the present case, but the result is precisely the same, for a confirmation subject to a condition which is not fulfilled is no confirmation at all, as was pointed out by the Court of Appeal in *Rex* v. *Jackson*. (1) Therefore, a further meeting had to be held. It follows that the only confirmation here was given at the meeting of May 16. At that meeting, the appellants were entitled to be present, and they were given no opportunity of being there. It is said that it would not have made any difference if they had been there. Whether that is so or not I do not know; future events will show. But in any case, it appears to me to be an irrelevant consideration. Further, I would merely like to point this out: that at that meeting of May 16 there were present three justices who had never heard the evidence that had been given on oath on April 25. There was a division of opinion. The resolution in favour of confirmation was carried by eight to two, and it is at least possible that that majority was induced to vote in the way it did by the eloquence of those members who had not been present on April 25, to whom the facts were entirely unknown.

Appeal allowed.

Solicitors for applicants: *Willis & Willis, for Stapleton & Son, Stamford.*

Solicitors for confirming authority: *Peacock & Goddard, for J. P. Maule, Huntingdon.*

Solicitors for licensee: *Clarke, Rawlins & Co., for Wyman & Abbott, Peterborough.*

(1) 96 L. T. 77.

W. I. C.

C. A. 1929 *Feb.* 28; *March* 1, 4, 5, 21.

PRINCESS PALEY OLGA *v.* WEISZ AND OTHERS.

[1928. O. 636.]

International Law—Recognition of foreign Government—Soviet Government—Confiscation of Goods—Validity of Sale of Confiscated Goods.

The English Courts will not inquire into the validity of acts done by a recognized foreign Government against its own subjects in respect of property situate in its own territory.

In 1918 a section of Russian revolutionaries took and retained possession of movables in Russia belonging to the plaintiff against her will. The act of those revolutionaries was subsequently adopted by the Soviet Republic, which was recognized in 1924 by the British Government as the de jure Government of Russia. In 1928 the movables in question were sold in Russia by the Soviet Republic to the defendants, who brought them to England. In an action by the plaintiff to recover those movables or damages for their detention or conversion:—

Held, that the action failed, as the Court could not inquire into the validity of the acts of a foreign sovereign Power which had been recognized by the Government of this country.

Oetjen v. *Central Leather Co.* (1918) 246 U. S. 297 approved.

APPEAL from a decision of MacKinnon J.

The plaintiff, who was the widow of the Grand Duke Paul of Russia, sued the defendants to recover certain goods or their value and damages for their detention, or damages for their conversion in the following circumstances. Before and at the time when the Russian revolution broke out in 1917, the plaintiff had in her house, the Paley Palace, at Tsarskoe Selo, near St. Petersburg, valuable articles of furniture, pictures and objets d'art. In 1918 a section of revolutionaries, whose act was subsequently adopted by the Government or by a usurping power which subsequently became the Government of Russia, took physical possession of the Paley Palace and its contents against the will of the plaintiff. The Paley Palace and its contents were thereafter and till the sale hereinafter mentioned, maintained at the expense of the Government as a State museum. In or about February, 1919, the plaintiff escaped from Russia without a passport. In April, 1928, certain of the articles which were in the Paley Palace and which had belonged to the plaintiff were sold by the Soviet Government to the

defendant Weisz acting on his own account or as agent for certain of the other defendants for 48,000*l*., the articles being described in the agreement of sale as "part of the nationalized property of the Paley Palace." On finding that the articles so purported to be sold were in England, the plaintiff brought an action for their recovery.

By his defence the defendant Weisz said that when he purchased the articles in question they had ceased to be the property of the plaintiff and were in the possession of the Soviet Government as public property; that that Government was the Government of a foreign sovereign State exercising supreme authority over that part of the former territories of the Russian Empire in which Tsarskoe Selo was situated, and had been recognized by the English Government on March 16, 1921, as the de facto Government of Russia, and on February 1, 1924, as the de jure Government of that country; and that in those circumstances the plaintiff could not be heard in His Majesty's Courts to dispute the validity of the appropriation of the articles in question by the Russian Government. In the alternative the defendant relied upon the following Decrees issued by the Soviet authorities as depriving the plaintiff of any right to claim the articles in question: (1.) A Decree of the Council of People's Commissaries published on March 5, 1921 (No. III.), by cl. 1 of which "all the movable property of citizens fled outside the confines of the Republic" was declared to be the property of the Russian Soviet Federal Socialist Republic; and (2.) a Decree of the All-Russian Central Executive Committee and of the Council of People's Commissars, dated March 18, 1923, which provided by cl. 5 that "Works of art, antiques, and articles of historical interest being in museums and depositories, as forming part of the Museum Fund and being safeguarded by State means, are recognised to be State property."

MacKinnon J. rejected the contention of the defendants that the seizure of the plaintiff's property having been adopted by the Government of Russia could not be inquired into by an English Court; but he held on the evidence that

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the Paley Palace was a museum which was being safeguarded by State means and that the articles in question formed part of the Museum Fund within cl. 5 of the Decree of March 18, 1923, and so became State property; and further that the plaintiff had, within the meaning of cl. 1 of the Decree of March 5, 1921, fled outside the confines of the Soviet Republic, and that in consequence the articles in question became the property of the Soviet Republic. He accordingly gave judgment for the defendants.

The plaintiff appealed.

Jowitt K.C. and *Valentine Holmes* for the appellant. MacKinnon J. was wrong in holding that the decrees relied upon by the defendants could vest the plaintiff's property in the Soviet Republic. Those decrees were made respectively by the Council of the People's Commissaries and the All-Russian Central Executive Committee, administrative as distinguished from legislative bodies, which had no legal power to do what they purported to do. In *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (1) Lord Cave, referring to a decree of a Council of Commissaries, said that it was only an order or resolution, unconfirmed by any body having legislative authority. In this case, too, there is no evidence that either of the decrees was confirmed, and in the absence of confirmation they have no binding force. Moreover, the decree of 1921 was repealed in 1927 by a decree which provided that confiscation was to be effected "in virtue of a resolution of a law court," and no such resolution has been made. Again, if the articles the subject of the action were treated as part of the Museum Fund under the decree of March 18, 1923, there was no power to get rid of them. When therefore they were sold it must be presumed that the articles had no museum value and therefore had not vested in the Soviet Republic, which therefore had no right to sell them. Further, where a State purports to act upon a municipal law it cannot be said that its act is exempt from inquiry as an act of State.

(1) [1925] A. C. 112, 125.

MacKinnon J. therefore rightly rejected the contention that what was done was an act of State.

[They referred to *Folliott* v. *Ogden* (1); *The Tervaete* (2); *The Jupiter* (3); *The Jupiter* (*No.* 2) (4); *The Jupiter* (*No.* 3) (5); and *Carr* v. *Fracis Times & Co.* (6)]

Sir Patrick Hastings K.C., *Rowland Thomas*, *Harold Murphy* and *D. A. S. Cairns* for the respondents. The respondents are entitled to the articles in question quite apart from any municipal law of Russia. Their right is based on the fact that the Soviet Government took the articles sold to the respondents by virtue of its sovereign power, and its right to do so cannot be questioned in the Courts of this country. As was said in *Oetjen* v. *Central Leather Co.* (7): "When a Government which originates in revolution or revolt is recognised by the political department of our Government as the de jure Government of the country in which it is established, such recognition is retroactive in effect and validates all the actions and conduct of the Government so recognised from the commencement of its existence," and, further, it was said in the same case that the Courts of one country will not sit in judgment on the acts of the Government of another done within its territory. See also to the same effect: *Underhill* v. *Hernandez* (8) and *Ricaud* v. *American Metal Co.* (9) The principle of those American cases, which was accepted in *A. M. Luther Co.* v. *James Sagor & Co.* (10), is fatal to the plaintiff's claim.

[They were not called upon as to the other points.]

Jowitt K.C. replied.

Cur. adv. vult.

March 31. The following judgments were read:—

SCRUTTON L.J. I have carefully considered the documents and evidence in this case, and have arrived at the same

(1) (1789) 1 H. Bl. 124.
(2) [1922] P. 197, 259.
(3) [1924] P. 236.
(4) [1925] P. 69.
(5) [1927] P. 122, 250.
(6) [1902] A. C. 176.
(7) (1917) 246 U. S. 297.
(8) (1897) 168 U. S. 250.
(9) (1918) 246 U. S. 304.
(10) [1921] 3 K. B. 532.

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result as MacKinnon J. both for the reasons he gives and for a further reason which has not found favour with him.

Princess Olga Paley was married to the Grand Duke Paul of Russia without the consent of the Tsar. The marriage being, therefore, morganatic, she did not become a member of the Romanoff family. This result saved her property from being confiscated under a Russian Decree confiscating the property in Russia of members of that family. The Princess had in 1917 at her house in Tsarskoe Selo, near St. Petersburg, or Petrograd, afterwards Leningrad, a quantity of valuable furniture and works of art, admittedly her property. In 1928 she discovered this property in England, and issued a writ claiming it against the persons in possession of it. They replied that they or their principals had bought that property from the Government, who, in 1924, had been recognized by the British Government as the de jure Government of Russia, and as the de facto Government in 1918 or the end of 1917. That Russian Government had, in the contract of sale, described the property as "nationalized property"; and the Russian Government claimed, and the defendants alleged, that by the law of Russia the goods claimed were the property of the Russian Government.

They did so for two reasons which the judge below has held to be valid. The first is by the Decree of March 18, 1923 (No. 245), of the All-Russian Central Executive Committee and of the Council of People's Commissaries, s. 5 of which is relevant: "Works of art, antiques, and articles of historical interest being in museums and depositories, as forming part of the Museum Fund and being safeguarded by State means, are recognised to be State property." I am quite satisfied on the evidence that from 1918 to the date of sale in Russia, the goods in question in this action were in a State museum in Russia, safeguarded at the expense of the State, having been in 1918 taken by force from the possession of Princess Paley by persons whose acts were adopted by the Russian Government. I agree with and adopt the finding of MacKinnon J. when he said: "I am driven to the conclusion that it is shown that this Paley Palace was a museum which

was being safeguarded by State means from funds provided by the Commissariat of Education, and that these articles, which had been put into an inventory, did form part of the Museum Fund." Being the property of the Russian State, the Russian Government has sold them; and I can find nothing in the Russian Decrees enabling their former owner to complain in these or any Courts of the sale by the Russian Government.

The second title in the Russian Government alleged by the defendants is under s. 1 of Decree No. 111 of the Council of People's Commissaries, signed by Lenin as chairman of that body. That section reads: There is declared "the property of the Russian Soviet Federal Socialist Republic all the moveable property of citizens fled outside the confines of the Republic, or hiding themselves up to the present time, and of whatever consisting, and wherever situated." It is clear on the evidence, and is admitted by the Princess, that she escaped from Russia without a passport; and I am satisfied that this is "fleeing from Russia" within the meaning of the Decree, and that thereby her property in Russia became automatically confiscated and the property of the Russian State without any necessity of further legal proceedings. It was argued that the Decree was only made by the Council of People's Commissaries, and that there was no evidence that it had been confirmed by the Executive Council. On the other hand, there was no evidence that it had been repealed or suspended by the Executive Council. It was printed in the official publications of the laws of Russia; and there was evidence which I accept that no Russian Court would require evidence that such a Decree had been confirmed by the Executive Council. On the ground of this Decree also I agree with MacKinnon J. that the plaintiff fails.

There is, however, a third defence which he rejected, which I think should also succeed. Counsel for the defendants put in the front of his argument below and before us that if the seizure of this property began without legal justification, or only by revolutionary right, it was ultimately adopted by a Government, which was recognized by the British

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Government as the lawful Government of the territory in which the property was, and that this was an act of State into the validity of which this Court would not inquire.

Incidentally, he referred to the Decrees of May, 1922, and sub-s. or Note 1 to the Civil Code of 1923, by which, when by a change of policy the Russian Government recognized to some extent private, as opposed to State, property, they yet prevented the original owner from asserting his original right against those who had by force or revolutionary right dispossessed him. The sub-section reads as follows : " Note 1. Former owners whose property was expropriated in virtue of the revolutionary right or generally passed into the possession of the labouring classes or toilers before May 22, 1922, have no right to claim the return of such property." The learned judge dealt with this rather summarily. He said it was a bad point, and not seriously relied on. As it was based on three decisions of the Supreme Court of the United States, followed by this Court in *A. M. Luther Co.* v. *James Sagor & Co.* (1), I regret that the learned judge did not indicate more precisely why it was a bad point. I think it was a good one. It may be that the learned judge was so satisfied that the Russian Government had lawfully acquired the property that he thought it waste of time to consider what would happen if they claimed not by law but by title of force. The United States, situate in the neighbourhood of South and Central American Republics, where the life of any Government is precarious and its death rarely by natural causes, frequently found in its territory property seized by a revolutionary force which ultimately succeeded in establishing itself in power and there sold the goods it had seized to persons who exported them to the United States, where they were claimed by their original owners. In *Oetjen* v. *Central Leather Co.* (2) these facts occurred with reference to a seizure in Mexico of property of a Mexican citizen which when sold came into the United States, and in *Ricaud* v. *American Metal Co.* (3) they occurred again with respect to the property of a citizen of the United

(1) [1921] 3 K. B. 532. (2) 246 U. S. 297.
(3) 246 U. S. 304.

States. In each case the Supreme Court acted on the principle stated thus in *Oetjen's* case (1): "It is also the result of the interpretation by this Court of the principles of international law that when a Government which originates in revolution or revolt is recognised by the political department of our Government as the de jure Government of the country in which it is established, such recognition is retroactive in effect and validates all the actions and conduct of the Government so recognised from the commencement of its existence. . . . . To these principles we must add that: 'Every sovereign State is bound to respect the independence of every other sovereign State, and the Courts of one country will not sit in judgment on the acts of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.'" Two further authorities of the Supreme Court of the United States are cited in support of that proposition. This Court acted on the principles laid down in the above cases in *A. M. Luther Co.* v. *James Sagor & Co.* (2) For this reason also in my opinion the claim of the plaintiff fails.

I do not go more minutely into the Decrees and evidence in this case, as, except in the matter I have mentioned, I substantially agree with the careful judgment of MacKinnon J. Our Government has recognized the present Russian Government as the de jure Government of Russia, and our Courts are bound to give effect to the laws and acts of that Government so far as they relate to property within that jurisdiction when it was affected by those laws and acts. The appeal must be dismissed with costs, with an order that the sum paid into Court as security for costs be applied, after taxation, in satisfaction of the defendants' taxed costs.

SANKEY L.J. The plaintiff having established that the articles in question in this case were originally her property the onus is upon the defendants to prove that the property

(1) 246 U. S. 302. (2) [1921] 3 K. B. 532.

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in the goods had before April, 1928, passed to the Soviet Republic. They seek to do so on several grounds: (1.) that the seizure of the goods in 1918 was an act of State which transferred the property from her to the State; (2.) that by a Decree of November 19, 1920, and published on March 5, 1921 (No. 111), the property in the goods passed from the plaintiff to the Soviet Republic, because she fled the country; and (3.) that by a Decree of March 18, 1923 (No. 245), the property in the goods was nationalized and became the property of the Soviet Republic.

The learned judge considered that the defendants had not made out the first of these three pleas, but gave judgment in their favour on the second and third. In my view the defendants made out their case on all three points.

With regard to the first, the act of State, it is clear, from the evidence of the plaintiff herself that, at a date in 1918, which is not precisely fixed, but which was before July 30, the Soviet authority had taken possession of the property in question against the will of the plaintiff. In fact, she realized, as she herself says, that her property had been stolen from her. The account of that is in the shorthand notes of her examination: "(Q.) Did you have a conversation with M. Polotzoff early in 1918 about your house? (A.) In January, 1918. (Q.) Shortly after that conversation with M. Polotzoff did some gentlemen come to look over your house? (A.) Yes, there came six gentlemen, I remember, but I only know two of them. (Q.) Will you give the names? (A.) Alexander Loukomsky, M. Benoit and M. Telebnoff. (Q.) When they came what happened? (A.) We went through the whole house, and I showed them the pictures and everything, and they said: 'Yes, certainly, it is worth taking care of that Palace.' (Q.) After that visit did anything further happen with regard to your house? Did they come back again? (A.) I came back every day, and then Mr. Jacoby came. (Q.) What did Mr. Jacoby do? (A.) He had to make the inventory of the house, so he asked me about things he did not know. (Q.) And did you help Mr. Jacoby? (A.) Yes. (Q.) And after that again, the public came in to look at the

Palace ? (A.) Yes, I showed them. (Q.) While the public were coming in who took them over the Palace ? (A.) I did. (Q.) Had you any servants living in the Palace at that time ? (A.) Yes, there was an old Sveitzer, the man who was at the door. (Q.) The porter ? (A.) Yes, the porter. (Q.) And he was a servant paid by you ? (A.) Yes. (Q.) At the end of July of that year your husband was taken to prison in Petrograd ? (A.) On July 30. (Q.) And did you go to Petrograd and follow him ? (A.) Yes. (Q.) And I think you were allowed to see him from time to time ? (A.) Yes, I saw him twice or three times a week. (Q.) And corresponded ? (A.) Yes, in the beginning. (Q.) While you were in Petrograd did you read in the newspaper some announcement about the Paley Palace ? (A.) Yes. (Q.) On reading that what did you do ? (A.) I went immediately to Tsarskoe Selo, saw the children, and then went to the Palace, but M. Telebnoff did not allow me to go in; he allowed me just to go through the house and say goodbye. (Q.) Was Telebnoff then staying in the Palace ? (A.) He said he would stay in the Palace with his family. (MacKinnon J. :) Was M. Telebnoff one of the six gentlemen who came before ? (A.) Yes, he was one of the six gentlemen. (Mr. Valentine Holmes :) After that you went back to Petrograd ? (A.) Yes. (Q.) And I think you were corresponding with your husband, and the last letter you got was on January 25, 1919 ? (A.) Yes. (Q.) And then ? (A.) Then he was murdered on January 30."

The Decree of August 14, 1918, was signed by one Zinoviev, as chairman of the Council of Commissaries of the Northern District Communes. In other words it was a decree of the local Petrograd Soviet. Admittedly it had no legislative effect, but, in fact, the occupation of the house and furniture was a seizure by the State. That appears from the shorthand notes, vol. iii., pp. 29 and 30 : " (Q.) At that date, August 14, 1918, the Constitution of July, 1918, was already in existence ? (A.) Yes. (Q.) At that date, as a matter of fact in August, 1918, did the officials representing the Northern Commune enforce their decrees ? (A.) Oh, yes. (Q.) That was a

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decree which we have there in terms, and, of course, you know the terms of it. In effect it seems to be a nationalizing or taking possession of property ? (A.) Yes. (Q.) Was that, to your knowledge, an exceptional case, or was the same sort of thing done all over Russia ? (A.) At any rate it was not an exceptional case. (Q.) It would appear to be a taking by some authority either self-constituted, or not ? (A.) It was more than self-constituted ; it was an authority provided by the Constitution of that time. (Q.) At any rate it was de facto power and authority at that time, whatever else is clear ? (A.) Yes. (Q.) I want to ask you what happened in another case of taking ? (MacKinnon J. :) Let me follow that. You say that it was more than a self-constituted authority ; it was an authority provided by the Constitution ? (A.) Yes. The Constitution provides that Russia is governed by Soviets. (Q.) Russia is declared a Republic of Soviets ? (A.) Yes. The Soviets were the very network of the Russian Government organization, and remain until now. (Q.) Then the Constitution recognizes the Soviets, but the Soviets, as I understand, could create themselves ? (A.) Certainly, they created themselves under the Provisional Government, and were the network of the organization of Russia under the Constitution, but in different places the distribution of areas and provinces between different Soviets was different at different times."

The American case of *Oetjen* v. *Central Leather Co.* (1), which was mentioned with approval in the Court of Appeal in *A. M. Luther Co.* v. *James Sagor & Co.* (2), states the American, which in my view is the same as English, law in such circumstances. The headnote says : " Who is the sovereign de jure or de facto of a foreign territory is a political question, the determination of which by the political departments of the country conclusively binds the judges. When a Government which originates in revolution or revolt is recognised by the political department of our Government as the de jure Government of the country in which it is established, such recognition is retroactive in effect and validates all the

(1) 246 U. S. 297. (2) [1921] 3 K. B. 532.

actions and conduct of the Government so recognised from the commencement of its existence. Every foreign State is bound to respect the independence of every other foreign State, and the Courts of one country will not sit in judgment on the acts of the Government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign Powers as between themselves. The principle that the conduct of one independent Government cannot be successfully questioned in the Courts of another is as applicable to a case involving the title to property brought within the custody of a Court as claims for damages based upon acts done in a foreign country, for it rests at last upon the highest considerations of international comity and expediency." That being the headnote, the Court held (1) that: "It is also the result of the interpretation by this Court of the principles of international law that when a Government which originates in revolution or revolt is recognised by the political department of our Government as the de jure Government of the country in which it is established, such recognition is retroactive." The headnote follows that. Then: "To these principles we must add that: 'Every sovereign State is bound to respect the independence of every other sovereign State.'" The headnote which I have read is taken from the judgment of the Court itself. The words "from the commencement of its existence" were criticized in *A. M. Luther Co.* v. *James Sagor & Co.* (2) *Oetjen's* case (3) is concerned with a revolution in Mexico. A similar decision was reached in *Underhill* v. *Hernandez* (4), in circumstances arising out of a revolution in Venezuela.

At the time of the seizure in question the Soviet Government had been in power since November 7, 1917, and was recognized by the English Government on March 16, 1921, as de facto, and on February 1, 1924, as de jure the Government of Russia. In addition to these facts it must be added that the Soviet Government kept control of these goods down to the

(1) 246 U. S. 302.
(2) [1921] 3 K. B. 532.
(3) 246 U. S. 297.
(4) 168 U. S. 250.

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time of their sale, purported to sell them, and describes them in the agreement of April, 1928, as "the nationalized property of the Paley Palace." In these circumstances, in my view, the Princess was dispossessed of this property by an act of State behind which our Courts will not go.

Agreeing as I do with the learned judge on the other points, I propose to state my reasons very briefly. Great difficulties have arisen in this and similar cases in ascertaining the exact effect of the Soviet law. The opposing parties cannot agree on a proper translation; their expert witnesses differ as to the Russian meaning of the legislation, while the English translation, which in some passages is obviously a literal rendering of the original, is also susceptible of various meanings. Over and above that, the legal principles involved are so different from our own that it is difficult to appreciate and apply them. In the early days of the Revolution, the position, as was natural, was vague and uncertain. The local Soviets seem to have been endowed with, or assumed, power. A formal Constitution was promulgated on July 10, 1918, under which three bodies were created: (1.) the All-Russian Congress; (2.) the Executive Committee; and (3.) the Council of People's Commissaries. The first two had legislative powers, the third mainly administrative powers only, except in emergency, although their Decrees were from time to time accepted as legislation.

At first an attempt was made to nationalize almost everything, but there were express enactments in favour of the class of toilers, which provided that in cases where they were concerned, the law might be administered to some extent in their favour. After a time, it was found that the policy of complete nationalization could not be maintained, and the beginning of a new economic policy started by a Decree of March 16, 1922, followed on May 22 by another Decree, and supplemented by the Civil Code of January 1, 1923, which to some extent recognized private property, subject to the provision that certain transfers of property should be recognized and remain undisturbed: see Notes 1 and 2 of art. 59 of the Code. It seems to me that the transfer of

property under Decree No. 111 was one of these latter. As to the plea under Decree No. 111 of November 19, 1920, the Decree provides, by clauses 1 and 3, what is to happen with reference to the confiscation of property. In my opinion this vested in the Soviet Government the property of persons who fled, as the Princess unfortunately was compelled to do. It was sought to say that that Decree was inchoate, because clause 3 shows that there was to be machinery for carrying it into effect, and none has been created. That clause, however, only regulates the choice of Department to which the property is to go when confiscated. I think the enacting clause—clause 1—does transfer the property. There is evidence that it was acted upon in Russia, and that although the Council of People's Commissaries had only administrative, as distinguished from legislative, power in many matters, this Decree was in fact recorded and published by the Soviet Government as having the force of legislation. I agree with the judge, who says: "I am constrained to come to the conclusion that this was an effective law, and that by virtue of it the Russian Court, properly applying the law, would hold that the plaintiff had, within its meaning, fled outside the confines of the Republic, and that this property of hers had thereupon, under this Decree, become the property of the Soviet Republic."

As to the plea under Decree No. 245 of March 18, 1923, the question is: Did the articles come within clause 5 of that Decree? Clause 5 is in the following terms: "Works of art, antiques, and articles of historical interest, being in museums and depositories, as forming part of the Museum Fund, and being safeguarded by State means, are recognised to be State property." It is not necessary for me to repeat the facts upon which the learned judge came to the conclusion that he did. I agree with him when he says: "I am driven to the conclusion that it is shown that the Paley Palace was a museum which was being safeguarded by State means from funds provided by the Commissariat of Education; and that these articles which had been put into an inventory did form part of the Museum Fund. I think that the

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defendants do succeed in showing that in consequence, under cl. 5"—that is the one I have just read—" of this Decree they were declared to be State property by this Decree."

For these reasons I am of opinion that the appeal should be dismissed.

RUSSELL L.J. This appeal must, in my opinion, fail for reasons which I can state shortly.

The articles, which are the subject of the action, are, to quote the statement of claim: "furniture, tapestries, pictures, carpets and other chattels of great value." It is common ground that they formed part of the contents of the Paley Palace and that they originally belonged to the plaintiff. They were, in April, 1928, sold and delivered to the defendant Weisz by or on behalf of the Russian Government; and the question for decision is whether, by that time, the chattels had ceased to be the property of the plaintiff, and had become the property of the Russian State.

On October 5, 1918, the Council of People's Commissaries made a Decree (No. 794) concerning the registration, placing on inventory, and safeguarding of works of art and antiques. By that Decree provision was made (inter alia) for carrying out such registration and making such inventories; for restricting alienation from one owner to another; and for assisting owners of articles or collections in safeguarding them. This Decree does not seem to involve or produce any change in the ownership of the chattels covered by it.

It is, however, important to ascertain what had happened to the Paley Palace and its contents at or about the time of that Decree. November 7, 1917, is regarded as the date when Soviet rule began. The plaintiff ceased to reside in the Palace in January, 1918. On November 4, 1918, Jacobnev went into occupation and took over the management. At that date no one was in control; there was one person there, Borasov, who was employed by the Minister of Education. Jacobnev employed ten people to look after the Palace, all the expenses being paid by the Commissariat of Education. An inventory of all the contents was made under his direction

and was completed in 1919. The public was admitted to the palace. Jacobnev remained in control of the palace until August, 1927, when it was handed over to a special Liquidation Committee. Further, the plaintiff gave evidence to this effect: that after she had quitted the palace she read in the newspapers that the palace had been seized. She went to the palace to see if it was true and found a man of the local Soviet in possession. She was not allowed to go in, but was allowed to take away an ikon and some linen, but nothing else. She realized then that, as she put it, "my property had been stolen from me."

On March 18, 1923, a Decree (No. 245) was made jointly by the Central Executive Committee (which possessed legislative power) and the Council of People's Commissaries, with a view, as stated, to supplementing the Decree of October 5, 1918. As I read that Decree, it provided for an overhauling of existing inventories, as the result of which articles having no museum value would be struck off, and would be "placed at the disposal of their owners." That seems to me the result and effect of arts. 1 and 3. The articles remaining on the inventories would be those possessing a museum value. Those articles, at the date of the decree, might be in the possession of private owners or might be in museums. As to those in the possession of private owners, the private ownership continues, but they are "deemed to have been placed under the control of the State" (art. 4); they are subject to restriction on sale (art. 4); and to the right of the State to utilize them for exhibitions and publication (art. 4); and they will be protected by Protection Certificates (art. 2). As to those which were in a museum and were being safeguarded by State means, those are "recognised to be State property" (art. 5).

In the English translation of this Decree the description of the chattels affected assumes various forms, such as "objects of art and antiquity," "monuments of art," "antiques and articles of people's life," "works of art, antiques and articles of historical interest." There can, however, be no doubt that the contents of the Paley Palace, having been

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included in the inventory spoken to by Jacobnev, would come under the purview of this Decree. In so far as they were not included in the revised inventories, they would be the plaintiff's property and at her disposal. In so far as they were included in the new inventories they would, if they were on March 18, 1923, in a museum being safeguarded by State means, be, not the property of the plaintiff, but the property of the Russian State.

Assuming, for the moment, that they were included in the new inventories, were they, on March 18, 1923, in a museum being safeguarded by State means? In my opinion upon the evidence they were. They were clearly being safeguarded by State means. Jacobnev in terms says in relation to his taking charge in November, 1918: "Actually the Palace at that time was already a museum and was open to the public."

It is true that there is no actual evidence as to the chattels being included in the new inventories; but we must, I think, presume that the Russian Government would not purport to sell that which their laws pronounced to be at the disposal of the owner, and accordingly we must presume that these chattels were not excluded from the new inventories. The result is that, these chattels being recognized to be State property under art. 5, the agreement for sale in April, 1928, correctly described the chattels as "part of the nationalized property of the Paley Palace" and the plaintiff had no ownership therein or title thereto.

This ground is sufficient to dispose of the action. There are, however, two other grounds upon which the defendants are entitled to succeed.

The Council of People's Commissaries issued a Decree on March 5, 1921 (No. 111), relating to the confiscation of the movable property of citizens who had fled outside the confines of the Republic. It is common ground that the plaintiff had so fled before March 5, 1921. By art. 1 of the Decree the movable property of such citizens "is declared the property of the Russian Soviet Federal Socialist Republic." Four reasons were urged on behalf of the plaintiff to show that the chattels remained her property, notwithstanding this Decree.

First, it was said that the Decree had no legislative effect. Upon the evidence I cannot accept this view. Moreover, it was published officially as one of the enactments for the year 1921, and is recognized as effective at the date of the Decree No. 248 which I mention later; secondly, it was said that the Decree itself did not confiscate the property but that some Decree or finding of a Court was necessary to effectuate this; and, thirdly, it was said that the Decree was inoperative unless and until some instructions had been issued under art. 3 thereof. These two contentions may be conveniently dealt with together.

By the Decree (art. 1) all the movable property is declared State property. That appears to me immediate and final; no further proceedings, so far, would seem to be contemplated. Having nationalized all such property, art. 2 then proceeds to divide it into two categories: (1.) objects of art and antiques, which have a special historical or artistic value, are to go to educational institutions under Order of the Commissariat of Education; (2.) all the rest is to be placed at the disposal of the Commissariat of Foreign Trade. Obviously some regulation would be necessary to provide for the division of the confiscated property between those two Commissariats, and accordingly, art. 3 provides that these two bodies are to issue full instructions for carrying out the Decree. This does not mean that the nationalization of the property does not take effect until these instructions are issued. Nor in my opinion does this Decree bring about a confiscation, within the meaning of the Decrees No. 143 of April 16, 1920, and No. 564 of October 26, 1921. Those decrees must, I think, relate to requisitions and confiscations of goods belonging to people who are within the State and are known to be there, for they provide for a minute with certain information being handed to the owner of the goods within a limited number of days, a procedure obviously impossible of application to the owners of property nationalized under No. 111.

Finally, it was said (and truly) that No. 111 was repealed by a Decree (No. 248) of March 28, 1927. That was a joint

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resolution of the Executive Committee and the Council of People's Commissaries, which confirmed an Act described as a Consolidation Act about the requisition and confiscation of property. By the joint operation of s. 13 (*c*) and s. 15 of that Act, it seems clear that after it came into operation, the property of persons fleeing would only become confiscated by resolution of a law Court. There is, however, no reason to suggest that the repeal undoes an existing nationalization of property or revests it in the original owner until a resolution of a law Court has been obtained. For these reasons, I am of opinion that the action fails on this second ground.

A third ground upon which the defendants would, in my opinion, be entitled to succeed is the point which was referred to as the act of State point. The evidence (to which I have already referred) clearly establishes a seizure of the property in 1918, either by a section of revolutionaries, whose act was subsequently adopted by the Government, or by a usurping power which subsequently became the Government. This Court will not inquire into the legality of acts done by a foreign Government against its own subjects in respect of property situate in its own territory.

There remains for consideration one point of general application urged on behalf of the plaintiff. It was said that assuming that the property had passed to the Russian State, yet the Russian State had no power to sell to the defendant Weisz. For myself, I am not satisfied that the State had not the power, but the point seems immaterial, for the evidence would not justify our holding that an unauthorized sale by the State would operate to revest the property in the plaintiff.

For these reasons, I am of opinion that the appeal fails and must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Lewis & Lewis.*

Solicitors for respondents: *Campbell, Hooper & Todd.*

J. S. H.

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Jan. 21, 22, 23, 24, 25, 28;
Feb. 22.

[1927. B. 5067.]

Local Government—Officers of Local Authority—Urban District Council—Clerk and Assistant Overseer—Dismissal at Will—Action by Clerk for accrued Salary—Competency—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 189—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 5, *sub-s.* 1.

Under Sect. 189 of the Public Health Act, 1875, an urban district council have power to remove their clerk from his office at pleasure and without cause or notice, and this power cannot be negatived or impaired by any provision as to notice to be given to terminate the employment in any contract of service entered into between the parties.

The clerk can maintain an action against the council for salary accrued due to him at the time of his removal from office.

Sect. 5, sub-s. 1, of the Local Government Act, 1894, confers on the local authority power to revoke the appointment of an assistant overseer at will and without cause, notice, or hearing.

ACTION tried by McCardie J. without a jury.

On August 18, 1922, at a meeting of the Dagenham Parish Council it was resolved that William Henry Brown, the plaintiff, "be and is hereby appointed assistant overseer of the board . . . . and to perform the duties of clerk to the parish council . . . . at an annual salary of 300*l.*" (1) The resolution was embodied in a document which was signed on behalf of the parish council by the chairman, but that document failed to comply with s. 3, sub-s. 9, of the Local Government Act, 1894, in that it was not under the hands of two members of the council as well as under that of the chairman. By a resolution of the parish council passed on October 21, 1924, the plaintiff's salary as assistant overseer was increased to 400*l.* a year. On January 11, 1926, the county council of Essex made an Order under s. 57 of the Local Government Act, 1888, converting the Dagenham Parish Council into the Dagenham Urban District Council. The Order provided that "any person in office . . . . as an assistant overseer of the parish shall continue in office on the

(1) By s. 5, sub-s. 1, of the Local Government Act, 1894: ". . . . the power of appointing and revoking the appointment of an assistant overseer, for every rural parish having a parish council, shall be transferred to and vested in the parish council. . . . ."

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same terms and conditions as now apply to that office." On April 9, 1926, the new urban district council met and passed a resolution, of which the minute was as follows: "Councillor Carroll proposed that Mr. W. H. Brown be the clerk to the new urban district council. Councillor H. C. Parry seconded. Subject to three months' notice on either side." (1) No written contract was executed. On April 30, 1926, the defendant council adopted a report of the Finance Committee that the plaintiff's salary should be 600*l.* a year, 400*l.* as superintendent assistant overseer and 200*l.* as clerk to the council. By s. 1 of the Rating and Valuation Act, 1925, the defendant council became the rating authority for their district. By s. 48, sub-s. 2, the plaintiff became a "transferred officer" under the Act, and by s. 48, sub-s. 7, he was to "hold his office by the same tenure and on the same conditions as heretofore."

On April 29, 1927, the defendant council resolved (*a*) "that the resignation of Mr. W. H. Brown, as clerk to the Dagenham Urban District Council be accepted," and (*b*) "that in the interests of the council, Mr. W. H. Brown, its late clerk, be instructed to take his overdue summer leave of three weeks as and from to-morrow, April 30, subject to his attendance at a meeting of the council should it be summoned during that period." It was further resolved "that Mr. F. W. Allen, deputy clerk and accountant, be temporarily appointed as acting clerk until such time as the council has made arrangements for the appointment of a new clerk and that for the period named all powers and duties relating to the appointment of clerk to the council be devolved upon him."

(1) By s. 189 of the Public Health Act, 1875: "Every urban authority shall from time to time appoint fit and proper persons to be medical officer of health, surveyor, inspector of nuisances, clerk, and treasurer. . . . . Subject, in the case of officers any portion of whose salary is paid out of moneys voted by Parliament, to the powers of the Local Government Board under this Act, the urban authority may pay to the officers and servants so appointed or employed such reasonable salaries wages or allowances as the urban authority may think proper; and, subject as aforesaid, every such officer and servant appointed under this Act shall be removable by the urban authority at their pleasure."

On May 20, 1927, the defendant council met, and passed a resolution: "that the council, being of opinion that Mr. W. H. Brown has been guilty of misconduct in failing or neglecting to fulfil his duties as a transferred officer within the meaning of the Rating and Valuation Act, 1925, do hereby dispense with his services." On May 21 the defendant council, by their acting clerk, sent to the plaintiff a letter in which the resolution was set out. On May 24 the plaintiff replied with a protest, and he asked the council to give him an opportunity of being heard and of giving a full answer to any charges. On May 28 the defendant council replied that: "no useful purpose would be served by granting an interview."

In December, 1927, the plaintiff began the present action in which he claimed arrears of salary as clerk to the defendant council, three months' salary in lieu of notice to determine his service as clerk, damages for wrongful dismissal from the office of assistant overseer and a declaration that he had never been dismissed from and/or had never resigned his office of clerk and/or as a transferred officer under the Rating and Valuation Act, 1925. By their defence the defendant council pleaded that, if the plaintiff were employed by them as he alleged (which they denied), he was not entitled to three months', or any, notice, but could always be removed and dismissed at their pleasure from any office or offices held by him. They also pleaded that the plaintiff had tendered to them his resignation of the office of clerk and that they had accepted it; and that, before tendering his resignation, he had misconducted himself in his offices of clerk and assistant overseer by wilfully disobeying the orders of the defendant council and neglecting the duties of his office, so that the defendant council were entitled to discharge him.

Bamber and *Harold A. Hill* for the plaintiff.

Naldrett K.C., *E. H. Tindal Atkinson* and *Caporn* for the defendant council.

Feb. 22. McCARDIE J. read a judgment in which he stated that, dealing first with the plaintiff's claim in respect

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of the clerkship, he found on the evidence that, on the assumption that the plaintiff had a right to resign his clerkship, he did not resign, nor did the defendants dismiss him, from that office, but that when he left the meeting of the defendant council on April 29, 1927, he left to take three weeks' holiday. His Lordship continued: The result is that the plaintiff is, I think, entitled to three weeks' salary (a total of 40*l.*), for it is plain that he was in the service of the defendants for that period at least from April 29, 1927. The defendants have paid this sum of 40*l.* into Court with a denial of liability. In my view, it would have been more proper and generous to have paid it into Court with an admission of liability, although I recognize the legal right of the defendants to rely on their very technical contention that no action in a Court of law will lie for such accrued salary. I deal with that contention briefly. It is one of very many points raised by the defendants. It is an important question for officers and persons employed by urban and other councils. If they cannot sue, even for accrued salary, as the defendants here contend, they are indeed in a most unfortunate position. It was suggested, as I gathered, by the defendants that the only remedy was by some form of mandamus: see, for example, *Bogg* v. *Pearse* (1) and *Addison* v. *Preston Corporation*. (2) The decisions are collected in the notes to s. 189 of the Public Health Act, 1875, in Lumley's Public Health, 9th ed., pp. 450, 451. I am glad to feel, however, that there are decisions which assist towards an opposite conclusion: see, for example, *Kendall* v. *King* (3) and *Hall* v. *Taylor*. (4) It is strange indeed that there is as yet no definite decision on the point. I propose to give one now. Having regard to the constitution, powers and obligations of such local bodies as urban district councils under the Public Health Acts and having regard also to sound legal principle and the dictates of good sense and convenience, I hold that an official such as the plaintiff is entitled to bring an action in the Courts for accrued salary against a local body such as the

(1) (1851) 10 C. B. 534.
(2) (1852) 12 C. B. 108.
(3) (1856) 17 C. B. 483.
(4) (1858) E. B. & E. 107.

defendants. I rule, therefore, that the plaintiff is entitled to recover the 40*l.* in this action.

I now pass to the next point in this important case. I have said that the plaintiff got three weeks' holiday leave from April 29, 1927. At the end of the three weeks (that is about May 20, 1927) he returned, but the defendants refused to allow him access to any papers and they refused to allow him to perform any duties. They treated him as one who had been finally dismissed from their service. No actual resolution was passed, no letter of dismissal was sent, but the attitude and the acts of the defendants were unmistakable and in my view constituted a dismissal. Another gentleman was discharging the duties previously performed by the plaintiff. That there was here a dismissal at the end of the three weeks seems to be reasonably clear: see my judgment in *Rubel Bronze and Metal Co., Ld.* v. *Vos* (1) and the cases there cited. Hence the plaintiff claims damages for wrongful dismissal, and he alleges that he was entitled to three months' notice by virtue of the minute of his appointment on April 9, 1926. To this claim the defendants answer, among other things, first, that the contract for three months' notice (if made) should have been under seal pursuant to s. 174 of the Public Health Act, 1875; (2.) that good grounds for dismissal existed; and (3.) that in any event the words in the minute were void of legal effect by reason of s. 189 of the Public Health Act, 1875. If this third point be correct, it is unnecessary to consider the two earlier points. I must, therefore, consider the true effect of s. 189. The directly relevant words are: "Subject as aforesaid, every such officer and servant appointed under this Act shall be removable by the urban authority at their pleasure." There can be no doubt, and indeed it is not disputed, that the contract between the plaintiff and the defendants was, as shown by the minute, that the plaintiff should give three months' notice before he left the defendants' service and that the defendants should give the plaintiff three months' notice before they terminated his employment. The minute itself

(1) [1918] 1 K. B. 315.

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is ample evidence of the bargain: see, for example, the limited company cases, as *In re Anglo-Austrian Printing and Publishing Union* (*Isaac's Case*). (1) The minute is made admissible evidence by Sch. I., Part I., r. 10, of the Public Health Act, 1875. The defendants, however, submit, and this is a grave matter for all clerks and other officials to local councils, that the minute is destitute of legal value on the point at issue and that no contract, whether verbal or written and whether under seal or not, is valid which provides that a clerk or the like official shall be engaged for a definite period or be entitled to notice before dismissal. It is asserted that the council can dismiss at any time, whether cause for dismissal exists or not, that the council is bound by no contract as to service, and that their powers, if bona fide exercised, are absolute, despotic and uncontrolled with respect to a person in the position of the plaintiff. It is to be noted that the plaintiff is not in the position, for example, of a medical officer of health, a portion of whose salary is paid out of moneys voted by Parliament and with respect to whose dismissal the Minister of Health may exert his powers. It is also to be noted that there is no right of appeal by the plaintiff, whether to the Minister of Health or to any other person. There is no statute similar to the Police (Appeals) Act, 1927. Further, it is to be noted that the plaintiff could make no claim to superannuation, for the Local Government and Other Officers' Superannuation Act, 1922, had not been adopted by the defendant council. Finally, it is to be noted that if a clerk is dismissed ignominiously for alleged misconduct he is yet unable, if the defendants be correct in their submission, to bring any action to clear his character.

Now is the defendants' contention correct? Could they dismiss the plaintiff at their will in complete disregard of the contract for three months' notice on either side? The words "at their pleasure" are singularly broad and indicate wide powers on the part of the council as to dismissal. I must remember that servants of the Crown, civil as well as military, except in special cases where it is otherwise provided

(1) [1892] 2 Ch. 158.

by law, hold their offices only during the pleasure of the Crown and can be dismissed at any time in spite of a contract for a period of service: see *Dunn* v. *Reginam* (1); *Hales* v. *Regem* (2), and the authorities cited in Robertson on Civil Proceedings by and against the Crown, pp. 355 et seq. Apparently this power of the Crown rests upon prerogative and I gather that any contract inconsistent with the prerogative of instant dismissal would be void on the ground of public policy: see, for example, *De Dohse* v. *Reginam*. (3) The question then is whether s. 189 of the Public Health Act, 1875, has conferred upon district councils a power of dismissal similar to that possessed by the Crown and a power of dismissal, moreover, which cannot be negatived or impaired by any contract of service whether under seal or not. I confess that I should myself have thought that the basis on which the powers of the Crown might be rested was a basis somewhat inapplicable to local corporate bodies such as the present defendants, but yet the Legislature inserted the words "at their pleasure" in s. 189 and these words represent no more than those ordinarily used to describe the powers of the Crown as to dismissal. It would seem that, if those words are to receive their full effect, it must follow that any contract which cuts down the right of dismissal would be inconsistent with the words and the apparent policy of the section and, therefore, void. This, I fear, would be the case even though a person might have agreed to accept a low salary on the express bargain and for the express reason that in consideration thereof he should be engaged for a definite period of service.

The question is obviously one which calls for mention of the relative decisions. It seems clear that if there be no question of contract as to notice the defendants could dismiss at any time and without any notice at all. As Cockburn C.J. put it in *Ex parte Richards* (4): "The local board have resolved, whether rightly or wrongly, to dismiss this gentleman, and it lies entirely within their pleasure to do so or not."

(1) [1896] 1 Q. B. 116.
(2) [1918] W. N. 286.
(3) (1886) 66 L. J. (Q. B.) 422*n*.
(4) (1878) 3 Q. B. D. 368, 370.

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See, too, *Reg.* v. *Blaney* (1), where O'Brien C.J. said: "If the office is held at will, the holder can be dismissed arbitrarily at any time, and quo warranto will not lie; if held during good behaviour he can be dismissed only for cause, and proceeding by quo warranto is applicable." See further the other cases cited in the notes to s. 189 in Lumley's Public Health, 9th ed., p. 453; *Wright* v. *Zetland* (*Marquis*) (2); and *Short* v. *Poole Corporation*. (3) But how does the case stand if there be, as here, a contract for three months' notice on either side? Is the contract valid, or is it a mere nullity? The cases of *Reg.* v. *Darlington School Governors* (4); *In re Teather* (5); and *Hayman* v. *Rugby School Governors* (6) do not really touch the point. In *Wood* v. *East Ham Urban District Council* (7) the plaintiff was the matron of an isolation hospital and fell within the purview of s. 189. She failed to prove any express contract, but the jury found that three months' notice would be reasonable before the termination of her employment by the defendants. The Court of Appeal held, however, that the action must fail inasmuch as s. 189 justified the defendants in dismissing her without notice. As Collins M.R. put it: "There was, it seems to me, a power to dismiss her without a reason assigned and at pleasure at any time." *Nicholson* v. *Whitstable Urban District Council* (8) calls for careful consideration. It was an action tried at the Maidstone Assizes on June 25, 1925, before Talbot J. and a common jury. The plaintiff was an assistant clerk employed at a salary of 3*l.* 10*s.* per week. His employment fell, therefore, within s. 189. The plaintiff alleged that it was an implied term of the contract that his employment should be permanent in character and not terminable save for misconduct, negligence or unfitness. Apparently, the jury found that the plaintiff believed, and acted on the belief, that he was secure in point of law against dismissal except

(1) [1901] 2 I. R. 93, 96.
(2) [1908] 1 K. B. 63, 70.
(3) [1926] Ch. 66.
(4) (1844) 6 Q. B. 682.
(5) (1850) 1 L. M. & P. 7; 19 L. J. (M. C.) 70.
(6) (1874) L. R. 18 Eq. 28.
(7) (1907) 71 J. P. 129.
(8) (1925) see 89 J. P. Newsp. 480, 508.

for misconduct, or negligence, or unfitness. The jury also found that the defendants had in fact given three months' notice and that such notice was reasonable. This of itself was enough to defeat the plaintiff's claim. Talbot J. delivered a judgment on the words and effect of s. 189. He said (inter alia): "The urban authority had not . . . . any power to enter into any contract of employment, either with the plaintiff, or with anybody else, under which they were deprived of that power which in the public interest the statute expressly conferred upon them of removing him at their pleasure." He added: "It is entirely inconsistent with the wording of that statute to suppose that in spite of it they were at liberty to enter into any such contract as is alleged, and certainly it appears strongly to confirm that view that no case can be produced during the 50 years in which this Act" [i.e., the Public Health Act, 1875] "has been in force in which any servant of a local authority who is under the terms of that section has maintained or even commenced an action against a local authority alleging that they had illegally terminated his employment." It may be said that the views of Talbot J. are, having regard to the finding of the jury, obiter dicta only at nisi prius, yet obviously they represent the considered view of the learned judge. Is that view sound? I must not forget the doctrine of ultra vires. Sect. 189 expressly gives the council power to dismiss at their pleasure. It is curious indeed that the section says that they "may" pay salaries but that officers such as the plaintiff "shall" be removable at pleasure. If a contract precludes the council from exercising their powers is it not inconsistent with the statutory power? The principle of such cases as *Mulliner* v. *Midland Ry. Co.* (1) is not without relevance and the decision of Russell J. in *York Corporation* v. *Henry Leetham & Sons, Ld.* (2), must not be overlooked, although it was the subject of some doubt in *Birkdale District Electric Supply Co., Ld.* v. *Southport Corporation* (3), where Lord Birkenhead said: "If a person

(1) (1879) 11 Ch. D. 611. (2) [1924] 1 Ch. 557.
(3) [1926] A. C. 355, 364.

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or public body is entrusted by the Legislature with certain powers and duties expressly or impliedly for public purposes, those persons or bodies cannot divest themselves of these powers and duties. They cannot enter into any contract or take any action incompatible with the due exercise of their powers or the discharge of their duties."

On the whole and bearing in mind the words of Lord Halsbury L.C. in *De Dohse* v. *Reginam* (1), I conclude that the view of Talbot J. was sound and that a council can dismiss its clerk at pleasure, whatever may be the contract between them. I see no escape from this view, a view which I state with the more regret because it seems to me to be at least arguable that if a council can dismiss at their pleasure the clerk, so the clerk can leave his post at his pleasure, however solemn may be the engagement between the council and himself. The position created by s. 189 is indeed remarkable, but I fear that the law is as I have stated it. It results from what I have said that the plaintiff's claim for damages for wrongful dismissal and for the declaration he asks must fail. Hence I need not consider the further points raised by the defendants on the first branch of the case.

I must now turn to the second branch of the case. Another series of questions of fact and another series of questions of law have been raised with respect to the dismissal of the plaintiff from the post of assistant overseer. He claims damages for wrongful dismissal on the basis of three months' notice. To this claim the defendants offer several answers. In the first place, they submit that the plaintiff held the office of an assistant overseer at the will of the defendants and that they could, therefore, dismiss him as and when they pleased and with or without cause. In the second place, they raise the alternative plea that the plaintiff was, in fact, guilty of misconduct which justified his dismissal. I proceed to consider, so far as necessary, the pleas raised by the defendants before I deal with certain important questions raised by the plaintiff in reply. As to the first plea, it will be remembered that there was no binding written contract

(1) 66 L. J. (Q. B.) 422*n*.

with respect to the plaintiff's appointment as assistant overseer on August 18, 1922. The resolution of that date merely appointed the plaintiff assistant overseer at a salary of 300*l*. It will also be remembered that the appointment was made under s. 5, sub-s. 1, of the Local Government Act, 1894, which gave the parish council the "power of appointing and revoking the appointment of an assistant overseer." Next it will be remembered that under the Order made by the Essex County Council on January 11, 1926, by virtue of s. 57 of the Local Government Act, 1888, the plaintiff continued in office upon the same terms and conditions as before. Finally, it will be remembered that under s. 48, sub-s. 7, of the Rating and Valuation Act, 1925, the plaintiff, as a transferred officer, held "his office by the same tenure and on the same conditions" as theretofore.

The first question, then, is whether the defendants could, under the words of s. 5, sub-s. 1, of the Local Government Act, 1894, "revoke" the plaintiff's appointment as assistant overseer at their will. I will deal hereafter with the question of bona fides and with other questions. It is plain that the consent of the Minister of Health is not required to any revocation of appointment. Apparently, if an assistant overseer desires to resign, he must make a formal resignation: see *Worth* v. *Newton*. (1) Can his employers dismiss him at any time and without prior notice given? No such words as "at their pleasure," which appear in s. 189 of the Public Health Act, 1875, appear in s. 5, sub-s. 1, of the Local Government Act, 1894, but the power of revocation again is given in the widest terms and no limitation is placed upon it. It seems to be unrestricted save as to any requirement of good faith which may be imposed by law, a point with which I will deal later. All the text-books take the view that an assistant overseer can be dismissed at any time without cause given and without notice. In my opinion, the text-books are correct in the view they take. I can see no real distinction between a power to dismiss "at pleasure" under s. 189 of the Public Health Act, 1875, and the power

(1) (1854) 10 Ex. 247.

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to " revoke " an appointment which is given by s. 5, sub-s. 1, of the Local Government Act, 1894. I must, therefore, hold that the defendants could dismiss the plaintiff at any time without notice and without cause from his post as assistant overseer, subject, of course, to the question of bona fides. Such is the law created by legislation. [His Lordship reviewed certain of the evidence, found as a fact that the plaintiff had not been guilty of misconduct and that the defendants had acted in good faith, if harshly, towards him and continued :] The allegation of dishonesty and of mere vindicativeness, therefore, wholly fails. But counsel for the plaintiff raised yet further points. Among them he argued that the dismissal of the plaintiff as assistant overseer could not stand inasmuch as the defendants gave the plaintiff no hearing before dismissal. That statement of fact is true and I regret it. The defendants should have remembered that, though the dismissal of an official may be a mere incident for the council who dismiss him, it may be a tragedy for the official dismissed. He is left destitute of remedy in the present case and without a right of appeal to any Government Department for restoration to office. Yet, as Mr. Naldrett correctly points out for the defendants, no right of hearing before dismissal is given by s. 5, sub-s. 1, of the Local Government Act, 1894, or by any other statute. I cannot in law hold that the plaintiff was entitled to any hearing, either before or after dismissal. Unhappily, *Local Government Board* v. *Arlidge* (1) is not an aid to the plaintiff.

Finally, counsel for the plaintiff submitted that not only must the defendant council act honestly, but it must also act reasonably in the matter of dismissal. He cited such well known cases as *Sharp* v. *Wakefield* (2) and *Roberts* v. *Hopwood* (3), and he drew particular attention to the words of Lord Wrenbury in the latter case. (4) It may be that the real effect of *Roberts* v. *Hopwood* (3) will require consideration in some future action and the words of Lord Wrenbury may

(1) [1915] A. C. 120.
(2) [1891] A. C. 173, 179.
(3) [1925] A. C. 578.
(4) [1925] A. C. 613.

have to be contrasted or weighed with other opinions, not only in the same case, but with those in many other cases, as, for example, *Wright* v. *Zetland* (*Marquis*) (1); *Hayman* v. *Rugby School Governors* (2); *Short* v. *Poole Corporation*. (3) I must not prolong this judgment by a review of the decisions on this important point. Suffice it to say that I have found in the present case that the defendants acted honestly and that I do not here feel entitled to substitute my own decision for the almost unanimous view of the defendant council of May 27, 1927. I differ from their view, but the facts are not such as would justify me in nullifying their resolution of dismissal.

I have now dealt with all the points of the case which have called for express opinion or determination. The conclusion I reach is that the plaintiff is entitled only to the 40*l*. in respect of the three weeks' leave mentioned in the earlier part of the judgment.

Judgment accordingly.

Solicitors for plaintiff: *Bentleys, for Snow & Snow, Southend.*

Solicitors for defendants: *Helliwell, Harby & Evershed, for Symons & Gay, Romford.*

(1) [1908] 1 K. B. 63. (2) L. R. 18 Eq. 28.
(3) [1926] Ch. 26.

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[1928. F. 325.]

Local Government—Officers—Borough Council—Sanitary Inspector—Reduction of Salary without Consent—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 62—*Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *ss.* 107, 108, *sub-ss.* 1, 2 (*b*) (*c*)—*London Government Act*, 1899 (62 & 63 *Vict. c.* 14), *ss.* 1, 2—*Public Health (Officers) Act*, 1921 (11 & 12 *Geo.* 5, *c.* 23), *s.* 7, *sub-s.* 1—*Sanitary Officers Order*, 1926 (*S. R. & O.* 1926, *No.* 552), *clauses* 13, 17.

A borough council reduced the salary of the senior sanitary inspector. They had not dismissed him nor had he resigned, and he did not consent to the reduction. The council did not obtain the unconditional consent of the Minister of Health to the reduction:—

Held, that the council had no power to make the reduction.

ACTION before McCardie J. without a jury.

The facts are fully set out in the judgment, and were shortly as follow.

The plaintiff, Alfred John Field, was senior sanitary inspector to the defendants, the borough of Poplar, which was the sanitary authority. He was first appointed a sanitary inspector in 1896. On July 22, 1920, the defendants raised his salary to 350*l.* per annum, rising by five annual instalments of 20*l.* to 450*l.* in 1925, the approval of the Minister of Health being given on August 30, 1920. On October 27, 1927, the defendants, in consequence of surcharges made on them and of the decision of the House of Lords in *Roberts* v. *Hopwood* (1), by resolution reduced the plaintiff's salary from 450*l.* to 433*l.* 3*s.* 7*d.*, according to a scale adopted by them. No notice of dismissal was given to him, nor had he resigned, and he did not consent to the reduction. On being applied to by the defendant council for his approval of the proposed reduction, the Minister of Health, on February 27, 1928, replied that "in the circumstances of the case he is prepared to approve of the proposed reductions provided the council give any notices and obtain any consents which may be legally necessary."

(1) [1925] A. C. 578.

The plaintiff claimed (1.) a declaration that the resolution passed by the defendants on October 27, 1927, was ultra vires and invalid; and (2.) an injunction restraining the defendants from acting on it.

Singleton K.C. and *S. G. Turner* for the plaintiff.

Croom-Johnson K.C. and *E. H. Tindal Atkinson* for the defendants.

Cur. adv. vult.

1929. March 1. McCARDIE J. read the following judgment. This apparently simple action reveals the strange complexity of English local government. The question for decision is whether or not the defendants made a lawful reduction in the plaintiff's salary as senior sanitary inspector, as from November 1, 1927. This question is one which affects, I am told, the rights and interests of over 1000 senior sanitary inspectors throughout the country. The ordinary lawyer or layman would doubtless take the view that the point at issue turns on the construction of one or two reasonably clear sections of Acts of Parliament; yet the consideration of the dispute between the parties has involved an examination of many intricate and obscure provisions.

The plaintiff, Mr. Alfred John Field, is the senior sanitary inspector to the defendants, the Mayor, Aldermen and Councillors of the Metropolitan Borough of Poplar. I mention at once that there is no charge of mala fides against the defendants, and no allegation of extraneous considerations, as in *Roberts* v. *Hopwood*. (1) The main facts preceding the period of controversy are these. In 1896 the plaintiff was appointed sanitary inspector to the board of works for the Poplar district, at a salary of 130*l*. per annum, rising by annual increments of 10*l*. to a maximum of 185*l*.; and his appointment was approved by the Local Government Board. In 1899, by virtue of the London Government Act of that year (62 & 63 Vict. c. 14), the defendants became the Metropolitan Borough of Poplar. From 1914 onwards the disastrous consequences of the Great War were slowly revealed. The cost of living rose steadily, until in 1920 the defendants,

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by a resolution of July 22, 1920, raised the salary of the plaintiff to the sum of 350*l.*, rising by five annual increments of 20*l.* each up to a maximum of 450*l.* in 1925. This salary he continued to receive until the present dispute. The salary was duly approved by the Minister of Health on August 20, 1920. In April, 1925, the House of Lords delivered their well known judgment in *Roberts* v. *Hopwood* (1) already referred to, whereby they upheld the action of the district auditor with respect to certain disallowances and surcharges made by him in connection with wages paid by the defendants to a number of their weekly servants. This decision led the defendants in due course to desire a revision of the salaries paid to their officials: hence there arose the matters which have led to this action. The defendants had, on June 7, 1926, duly appointed the plaintiff to be their senior sanitary inspector, and this appointment was approved by the Minister of Health on June 28, 1926. In the year 1927 the defendants decided to effect a general reduction in the salaries paid by them. Hence on September 28, the defendants by letter to the plaintiff said: "The council regret that they are compelled to reduce your salary after the end of the month of October. You will be notified shortly of the reduced rate of salary which will be proposed by the council to operate in respect of your appointment from November 1 next. It is with great reluctance that the council find that they are compelled to adopt this course. Having regard, however, to the surcharge made upon the members and the recent decision of the House of Lords on wages in conjunction with the provisions of the Local Authorities (Audit) Bill, the council will be placed in an untenable position unless an alteration is made in the salary payments." Such was the letter of the defendants. It is to be noted, however, that the auditor, in his report to the defendants of July 7, 1926, after giving certain figures with respect to scales of wages and salaries, said: "The following tables give the main features of this comparison, which does not include the following cases, in which no exception has been taken to the payments made

(1) [1925] A. C. 578.

by the council"; and then he mentions, amongst other things, the case of sanitary inspectors. On October 27, 1927, the defendants adopted a report of their general purposes committee, dated October 24, 1927, and resolved that the salaries of various officials should be reduced. In substance the plaintiff's salary was cut down from an existing salary of 450*l.* a year to a salary which depended to a substantial extent on the cost of living figure. The material parts of this resolution are these: "(1.) That the salary scales under the grading scheme of 1920 (excepting health visitors) be considered as appropriate when the operative index figure for the civil service stood at 80; (2.) that these salaries be allocated as follows: (*a*) basic figure; (*b*) bonus at 80; (3) that as from November 1 next the salary payable shall be the basic figure (*a*) plus the appropriate bonus calculated under the civil service index figure operating for the period; (4.) that the salary scales of all officers other than those already fluctuating with the cost of living be adjusted on similar lines together with the wages of all temporary clerical assistants." Then, (9.) "that when necessary the sanction of the Minister of Health be sought to the reductions proposed." By a letter of October 28, 1927, the defendants communicated to the plaintiff the resolution I have set out, and they informed him that as from November 1, 1927, his salary would be adjusted accordingly. They stated the figures as follows: "Your present basic figure is 308*l.* per annum, and your bonus is 143*l.* per annum, totalling 450*l.* For the period ending February 29, 1928, the operative index figure is 70, and your bonus will, therefore, be reduced as from November 1, 1927, to 125*l.* 3*s.* 7*d.* per annum, total revised salary and bonus 433*l.* 3*s.* 7*d.* On March 1, 1928, and every six months thereafter (until further notice) your bonus will be adjusted in accordance with the civil service scheme." The broad result, therefore, is that the plaintiff's salary fell from 450*l.* to 433*l.*; and as the cost of living falls further, so will the salary lessen. No notice of dismissal was ever given to the plaintiff, and it is not alleged that he ever expressly consented to the reduction in his salary. He never

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resigned his appointment. It is plain that he himself objected throughout to any reduction.

The defendants further contend that the plaintiff is, for reasons I will deal with later, bound by the resolution of the defendant council, and must be taken to have consented thereto.

It remains to add at this stage of the matter that on November 3, 1927, the defendants communicated to the Minister of Health their resolution of October 27, 1927, and requested his approval to the intended alterations of salary. Correspondence followed, and on February 27, 1928, the secretary of the Minister of Health wrote: "I am directed by the Minister of Health to advert to your letters . . . . with reference to the proposal of the metropolitan council of Poplar to reduce the salaries of certain of their officers, and to state that in the circumstances of the case he is prepared to approve of the proposed reductions provided the council give any notices and obtain any consents which may be legally necessary." It is well to note the guarded and conditional character of the Minister's approval.

Two days before this letter of the Minister of Health was written the plaintiff had issued his writ in this action, claiming: (1.) a declaration that the resolution passed by the defendants on October 27, 1927, was ultra vires and invalid in so far as it related to the plaintiff; (2.) an injunction to restrain the defendants from acting upon the said resolution so far as it related to the plaintiff; and (3.) a declaration that the plaintiff was entitled to be paid salary at the rate of 450*l.* per annum so long as he holds his office of chief or senior sanitary inspector and unless and until he consents to a variation of the said salary, and such variation is approved by the Minister of Health; (4.) arrears of salary at the rate of 1*l.* 8*s.* per month from November 1, 1927.

I now turn to the first point of law in the case—namely, can the defendants reduce the plaintiff's salary of 450*l.* as chief sanitary inspector unless he consents to a variation thereof, with the approval of the Minister of Health? To answer this question, and to ascertain the status and rights

of the plaintiff, it is necessary to look at many statutory and other provisions. I will not set out the earlier and intricate legislation which precedes s. 62 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), but I will take that section as a starting point. It says: "The Metropolitan Board of Works, and (subject to the provisions herein contained) the board of works for every district under this Act, and the vestry of every parish mentioned in Schedule A to this Act, shall respectively appoint or employ, or continue for the purposes of this Act, and may remove at pleasure, such clerks, treasurers, and surveyors, and such other officers and servants as may be necessary, and may allow to such clerks, treasurers, surveyors, officers, and servants respectively such salaries and wages as the board or vestry may think fit." Upon this section I merely point out two things: first, that the board may remove at pleasure. As to whether there are any limitations of this power, I need only refer to my judgment in the case of *Brown* v. *Dagenham Urban District Council*. (1) Secondly, the section provides that the board may pay such salaries and wages as they may think fit.

Under the London Government Act, 1899, ss. 1 and 4, the defendants became clothed with the powers of s. 62 of the Act of 1855. Meanwhile, however, the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), had been passed, and s. 107, sub-s. 1, provided: "Every sanitary authority shall appoint an adequate number of fit and proper persons as sanitary inspectors." It will be noted that no express power was given to pay salaries, but presumably this power sprang from s. 62 of the Act of 1855.

Now it is here essential to cite and emphasize s. 108 of the Public Health (London) Act, 1891, for it has a strong bearing on the points at issue in this case. Sect. 108, sub-s. 1, says, so far as material: "Subject to the provisions of this Act as to existing officers, the Local Government Board shall have the same powers as they have in the case of a district medical officer of a poor law union with regard to the qualification, appointment, duties, salary, and tenure of office

(1) Ante, p. 737.

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of every medical officer of health and sanitary inspector, and one-half of the salary of every such medical officer and sanitary inspector shall be paid by the county council out of the Exchequer contribution account in accordance with section 24 of the Local Government Act, 1888, and that section shall be construed as if in sub-s. 2 thereof the reference to the Public Health Act, 1875, included a reference to this Act." Sub-s. 2 (*b*) of s. 108 says: "A medical officer of health shall be removable by the sanitary authority with the consent of the Local Government Board, or by that board, and not otherwise: Provided that the Local Government Board shall take into consideration every representation made by the sanitary authority for the removal of any medical officer, whether based on the general interests of the district, on the conduct of such officer, or on any other ground." Sub-s. 2 (*c*) says: "Any such medical officer shall not be appointed for a limited period only." Incidentally, I may mention that by s. 3, sub-s. 1 (*a*), of the Ministry of Health Act, 1919 (9 & 10 Geo. 5, c. 21), the Minister of Health took over the powers and duties of the Local Government Board.

Now, acting under the powers conferred by the Public Health (London) Act, 1891 (see ss. 106, 107 and 108), the Local Government Board made certain regulations by a general order of December 8, 1891, the Sanitary Officers (London) Order, 1891. Article 10 is as follows: "Every sanitary inspector shall continue to hold office for such period as the sanitary authority may, subject to our approval, determine at the time of his appointment, or until he die or resign, or be removed by such authority or by us, or be proved to be insane by evidence which we shall deem sufficient." I am not surprised at this reference to possible insanity, for I confess that if any sanitary inspector spent much time in seeking to unravel the appalling intricacies of the Acts and regulations which deal with his duties, status and rights, he might well develop ere long symptoms of mental instability. The regulations further provide by art. 9: "Every medical officer of health shall continue to hold office until he die, or resign, or be removed by the sanitary authority with our

consent, or be removed by us, or be proved to be insane by evidence which we shall deem sufficient." There is one further article which I must mention. It is No. 14, which says: "The sanitary authority shall pay to every officer such salary as may be approved by us." This, I may observe, seems to be a useful protective provision.

I now proceed to further relevant enactments in this curious maze. On July 28, 1921, there was passed the Public Health (Officers) Act, 1921 (11 & 12 Geo. 5, c. 23). By s. 7, sub-s. 1, it is provided as follows: "The provisions of paragraphs (*b*) and (*c*) of sub-s. 2 of section 108 of the Public Health (London) Act, 1891 (which relate to the removal and appointment of medical officers of health of metropolitan borough councils), shall apply to the chief or senior sanitary inspectors of metropolitan borough councils and to the medical officers of health and the chief or senior sanitary inspector of the port sanitary authority of the Port of London as they apply to the medical officers of health of metropolitan borough councils, and those provisions shall have effect accordingly." It will be seen that the effect of this provision, apparently, is (1.) that a senior sanitary inspector shall only be removable by the sanitary authority with the consent of the Ministry of Health and not otherwise; and (2.) that no senior sanitary inspector shall thenceforward be appointed for a limited period only.

I pass over the Sanitary Officers (Tenure of Office) Order, 1921 (S. R. & O. 1921, No. 444), because it was revoked by cl. 3 of the next Order I mention, the Sanitary Officers' Order, 1922 (S. R. & O. 1922, No. 276). I will pass that over also inasmuch as it was revoked, and in substance re-enacted, by cl. 3 of the Sanitary Officers' Order, 1926 (S. R. & O. 1926, No. 552). This later Order is important. It purports to be made by the Minister of Health "in exercise of all powers enabling him by any statute in that behalf." The validity of the Order is not challenged before me. Arts. 6 to 13 (inter alia) relate to medical officers of health. I mention two of them: "(12.) A medical officer of health shall not be appointed by a local authority who does not, as one of the

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terms of his engagement, agree to give at least one month's notice before resigning his office or to forfeit such sum as may be agreed upon at the date of his appointment as liquidated damages." Then "(13.) A local authority shall pay to every medical officer of health such salary as may from time to time be approved by the Minister." Part III. of the Order deals with sanitary inspectors, and I need only cite Nos. 15 and 17. No. 15 says: "This part of this Order shall apply in the case of every sanitary inspector appointed or reappointed by any local authority in London and of any other sanitary inspector one half of whose salary is intended to be repayable by a county council or county borough council in pursuance of any statute in that behalf." No. 17 says: "The provisions of articles 6 to 13 inclusive of this Order, with the exception of article 9 in the case of a sanitary inspector appointed or reappointed by any local authority in London, shall apply to a sanitary inspector, as they apply to a medical officer of health, with the necessary modifications." The result, therefore, is that a local authority like the defendants must pay to every sanitary inspector such salary as may from time to time be approved by the Minister of Health.

I have now completed the somewhat tedious recital of the confused and strangely complex series of provisions which affect the appointment, tenure and salary of a chief sanitary inspector. I venture to express the hope that the day is not far distant when our local government law will pass from the evils of an almost chaotic obscurity into the region of lucid and orderly arrangement.

It is important now to state clearly the broad results of what I have set forth. They are these: (1.) In October, 1927, the plaintiff was receiving a salary of 450*l.*, which had been approved by the Minister of Health; that is to say, a salary which the defendants were bound to continue, unless and until it was lawfully altered. (2.) The plaintiff's appointment was not determinable at the mere will or pleasure of the defendants. His appointment rested on a special basis. He could only be dismissed by the defendants with the consent of the Minister of Health. (3.) The defendants

never purported to dismiss the plaintiff, or to give any notice of dismissal; and they never applied to the Minister of Health for permission to do so. (4.) The plaintiff had not resigned or offered to resign, and, therefore, his employment continued, prima facie, on the same terms as theretofore. (5.) No change of salary had been unconditionally approved by the Minister of Health. The consent (if any) given by the Minister of Health by the letter of February 27, 1928 (a letter written, as I have pointed out, two days after the issue of the writ in this action), was subject to the proviso that the defendant council should "give any notices and obtain any consents which may be legally necessary." In these circumstances it seems clear that the plaintiff occupied a position which differed in striking fashion from that held by, for example, the clerk to the urban district council who was the plaintiff in the recent action of *Brown* v. *Dagenham Urban District Council* (1) (see my judgment therein). There the clerk was liable to immediate dismissal at any time at the pleasure of the council—see s. 189 of the Public Health Act, 1875. His salary was quite free from any question of approval by the Minister of Health. The council could dismiss and reappoint at their will, and thus could alter the salary at their will, provided the clerk was willing to continue in their service at the reduced reward. I therefore hold that these defendants could not cut down the plaintiff's salary without his consent, given by himself or some authorized agent.

The second question in this case, therefore, is whether or not any binding consent was given. The defendants say Yes; the plaintiff says No. In their defence the defendants put the matter as follows. First they say that the plaintiff's salary was fixed in July, 1920, as the result of negotiations between the defendants and the National Association of Local Government Officers, of which the plaintiff was a member. Secondly, they say as follows: "The defendants say that between the months of July and September, 1927, they were in negotiation with the aforesaid National Association,

(1) Ante, p. 737.

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as representing the members thereof, in relation to a revision of the salaries of (inter alios) sanitary inspectors, and on or about September 27, 1927, the said association approved of a form of notice to be sent by the defendants to officers (members of the said association) as to such revision, which said notice was to be in substitution for a formal notice terminating their respective employments and offering re-engagements on new terms. On September 28, 1927, a notice in such approved form was sent by the defendants to the plaintiff." Further, the defendants say that after the said notice of September 28, 1927, and their letter of October 28, 1927, the plaintiff elected to continue in the service of the defendants as a sanitary inspector, and that he accepted for several months the reduced salary whereby, they contend, a new contract of employment was made.

This defence raises an unusual and perhaps an important point. It will be noticed that the defendants do not allege that the plaintiff ever personally agreed to accept a reduced salary. It is clear that the plaintiff objected throughout to a reduction. As the borough treasurer quite frankly put it: "I knew that the plaintiff opposed it all through." The town clerk said the same thing, and added: "We hoped that the plaintiff would submit to the view of others." But the defendants' counsel vigorously contended at the trial that the plaintiff was bound by the acts and views of the National Association of Local Government Officers. It is necessary, therefore, to say a few words about that association. It is a large and powerful body, with many members throughout the country; and it is in many ways a most useful organization. It was established many years ago. The rules and constitution set forth the following objects, among others: "(*a*) To organise the whole of the professional, administrative, technical and clerical employees in all departments of the service. (*b*) To improve the conditions and protect the interests of the association's members. (*c*) To regulate the relations between such members and between them and their employers. (*d*) To initiate and assist in movements for the betterment of service conditions. (*e*) To do all such

things as may from time to time be considered advisable to safeguard maintain and improve the status and promote the advancement of local government officers and the service. (*g*) To confer or co-operate with Government departments or local authorities in regard to local government and local government officers. (*o*) To do such other lawful things as are incidental and conducive to the attainment of the above objects or of any of them." The purpose and function of the N.A.L.G.O., as it is called, are therefore wide. Here I should mention that the plaintiff also belonged to the sanitary inspectors' association. That body wrote to the defendants on September 20, 1927, definitely protesting against the reduction of the salaries of the plaintiff and others. A few more broad facts may be stated. It is clear that in September, 1918, the defendant council, by resolution of September 19, 1918, decided to recognize the Borough of Poplar Municipal Officers' Association (a branch of N.A.L.G.O.), as the local representatives of the official staff. The plaintiff belonged to that branch throughout. It has a few rules only. The only material objects stated in the rules are these: " (*a*) To improve the status and to take such action as may from time to time be desirable to safeguard and forward the interests of all the officers, and to consider questions of general municipal interest." The only material rules are Nos. 6 and 7. Rule 6 provides for a management committee. Rule 7 declares that the management committee shall have power (inter alia) " (*c*) To make the necessary arrangements to establish and to further the best interests of the respective sections." It seems clear also that in 1920 the increase of the plaintiff's salary and the salary of others followed after negotiations between the defendants and the Poplar Municipal Officers' Association. It is also clear that at two meetings of the defendants' negotiating committee with the representatives of the Borough of Poplar Municipal Officers' Association, it was arranged that notice to terminate employment should not be given to any officials whose salaries were under discussion for reduction; but that notice only of reduction of salaries should be given. Apparently the dates of those

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two meetings were September 22 and September 27, 1927. At such meetings, however, there was no express mention of any notice to be given to sanitary inspectors. Moreover, at such meetings the majority of those present for and on behalf of the Borough of Poplar Municipal Association apparently approved the defendants' scheme for reduction of salaries.

Meanwhile, however, on September 21, 1927, a general meeting of the Poplar branch was held, at which the plaintiff was present. The majority of those present, in substance, approved the defendants' scheme for reduction of salaries. The plaintiff, however, objected to the proposal and voted against it. The defendants wrote their letter to the plaintiff of September 28, 1927 (announcing the intention to reduce salary), and their letter of October 28, 1927 (announcing their actual decision to reduce), well knowing that the plaintiff objected emphatically to the step they were taking. In these circumstances I fail to see how the plaintiff can be bound by any arrangement made by N.A.L.G.O. or its Poplar branch in 1927. It is quite true that the association had entered into negotiations or discussions with the defendants in 1920 which led to an increase in the plaintiff's salary. But the plaintiff (as was natural) assented to the change of salary, and the change was approved also by the Minister of Health. All that happened was that the plaintiff decided to accept the better position created through the negotiating medium of the association. But neither the association nor its branch were the plaintiff's agents in the usual sense of that term. If agency of any sort existed, moreover, it certainly ceased when the plaintiff expressly objected to and voted against any attempt to reduce his salary. The N.A.L.G.O. knew it had ceased, the defendants knew it had ceased. What authority, then, it may well be asked, had the association or its branch to alter the plaintiff's status, or to ignore or override his statutory rights and privileges, or to reduce his salary without his consent, and in defiance of statutory provisions as to his employment and remuneration? The answer, in my view, is that they

had no such authority. It follows, therefore, that the attempt of the defendants to reduce the plaintiff's salary without his consent as from November 1, 1927, was ultra vires and void. The plaintiff, therefore, is in my view entitled to the relief asked for in the statement of claim. The defendants must pay the costs of the action.

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Judgment for plaintiff.

Solicitor for plaintiff: *G. J. Strickland.*
Solicitor for defendants: *W. H. Thompson.*

W. L. L. B.

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